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REFLECTIONS ON PROMOTING "THE GENERAL WELFARE"

Hugh Heclo — Two Traditions of General Welfare
Theodore J. Lowi — Ethical and Constitutional Bases
Virginia Sapiro — Gender and Social Policy
Charles V. Hamilton — The Welfare of Black Americans
Doris A. Graber — The Costs of Press Freedom
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CENTENNIAL YEAR 1886–1986

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CENTENNIAL YEAR 1886–1986

In commemoration of its centennial in 1986, *Political Science Quarterly* is publishing five numbered issues. This issue contains commissioned articles on the constitutional injunction to "Promote the General Welfare." A later issue will contain commissioned articles on the mandate to "Provide for the Common Defence." The publication of the two special issues is made possible by a gift from the Exxon Education Foundation.

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From the Editor:

In this issue of specially commissioned articles . . .

HUGH HECLO contends that throughout their history Americans have embraced two different but equally legitimate conceptions of the general welfare. The greatest danger for domestic policy presently is losing the vital balance between these two visions.

THEODORE J. LOWI attempts to trace the ethical origins of the welfare state in order to develop a better political theory as a basis for constructive reform of welfare policies.

VIRGINIA SAPIRO explores the relationship of social-policy thinking to gender ideology. She emphasizes the difference between norms governing the ability of individuals, on the one hand, to *provide* for themselves and others financially and, on the other, to *care* for themselves and others through personal services.

CHARLES V. HAMILTON discusses the impact of the black political struggle on the development of social welfare policies, especially over the last two decades. His view is that "entitlement" has taken on a meaning not only of guaranteed "rights," but also of guaranteed "resources," the most important of which is employment.

DORIS A. GRABER reviews the unparalleled freedom from government regulation the Constitution granted to the press. Given this privileged position of the press, she believes it has fallen far short of being a free marketplace of ideas and information, the people's watchdog over government, or the guardian of minority rights.

HENRY J. ABRAHAM maintains that the contemporary litigation explosion has clogged our judicial tribunals, engendered unacceptable delays, and rendered aspects of the judicial process beleaguered. He offers a series of recommendations for making the judicial processes more conducive to the general welfare.

DEMETRIOS CARALEY examines how the general welfare is affected by "New Federalism" proposals to reverse a fifty-year policy of federal aid programs for poor people and for city and state governments.

IRA KATZNELSON analyzes how the language of politics and public policy develops and changes at key moments of choice and possibility. He stresses how in understanding the evolution of policy, certain issues on which policy was "silent" must also be looked at.

DEMETRIOS CARALEY

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General Welfare and Two American Political Traditions

HUGH HECLO

In the notes for what would later become his famous book about America, Alexis de Tocqueville recorded an incident that occurred in 1831 during his journey through the "wilds," known today as Buffalo, New York. Returning at nightfall to his inn outside of town, Tocqueville literally stumbled across a young Indian on the roadside, drunken and suffering from exposure. The Frenchman hurried back to town seeking help and offering to pay any expenses involved in caring for the Indian at the inn. After finding that no one would help, Tocqueville wrote in his notes as follows:

> "What is the life of an Indian?" That indeed was the basis of the general feeling. In the midst of this society, so well policed, so prudish, and so pedantic about morality and virtue, one comes across a complete insensibility, a sort of cold and implacable egotism where the natives of America are concerned. The true owners of the continent, Americans feel, are those who know how to take advantage of its riches. In refusing the first inhabitants the capacity to become civilized, God has destined them in advance to inevitable destruction . . . . Satisfied with this reasoning, the American goes to church, where he hears a minister of the Gospel repeat to him that men are brothers and that the Eternal Being who made them all in the same mold has imposed on them a duty to help one another.[1]

[1] Alexis de Tocqueville, "A Fortnight in the Wilds," in J. P. Mayer and Max Lerner, eds., *Democracy in America* (New York: Harper and Row, 1966), 736–37. It should be added that the Frenchman disapproved of public welfare, for all the reasons cited by today's conservatives, and saw private charity as inherently inadequate. Tocqueville promised, but never produced, a study recommending ways to deal with the structural causes of poverty. See his "Memoir on Pauperism," in Seymour Drescher, ed., *Tocqueville and Beaumont on Social Reform* (New York: Harper, 1968).

HUGH HECLO is professor of government at Harvard University and former senior fellow at The Brookings Institution. His most recent books are *A Government of Strangers* and *Policy and Politics in Sweden.*

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Of course, it was also Tocqueville who would go on later in his published work to marvel at the "habits of the heart" that led Americans to volunteer, to participate in community affairs, to band together to help each other. It was this, he thought, that counterbalanced what would otherwise be the tendency for a culture of individualism to degenerate into a collection of asocial beings locked in the solitude of their own hearts and their small circles of family and friends.

In our own times, the tensions Tocqueville felt are very much with us. An old, old debate has been resurfacing. It is a debate about the meaning and scope of America as a national society. It raises questions about the appropriate scope of individualism, of community boundaries, of obligations we owe or do not owe to each other. It is therefore, ultimately, a debate about the meaning of the general welfare itself.

There are many crosscurrents within this debate today. These mixed feelings not only divide political partisans, but often also set our own personal preferences in conflict one with the other. What kind of political society *are* we? Consider just a few of the answers proposed in recent years. According to one view, America should be seen as a nation of communities, a spectacularly diverse collection of individuals in local association and bound together by common sympathies—or what President Ronald Reagan in 1982 described as "a communion of hearts that rings the country."[2] Government, according to this view, and the federal government in particular, can usually be found undermining the true foundations of social welfare that exist at the level of local communities, volunteer groups, private business, and neighbors helping neighbors (or in more modern terms, "networking," support groups, and so on). Another overlapping perspective places special emphasis on the traditional values that are said to define America as a national society. Taken in isolation, the first idea—a nation of communities—can encompass anything from the communal visions of the New Left to fashionable libertarianism; the second view of America as a nation united by a moral code adds a much more uniform content to the national society. These shared values are said to be self evident. They consist of the traditional family—(not "alternative lifestyles"), of work—(not government income guarantees), of respect for the law and conventional standards of decency—(not permissiveness or submerging personal responsibility for wrongdoing with social explanations of behavior). Using government to "impose middle class values" is not abandoning an antigovernment stance; it is a matter of adopting a pro-American approach to social welfare.[3]

There are still other visions in contention. Another school of thought, with roots in the pluralistic tradition, sees a nation of crosscutting groups and values that have to coalesce at the national level if their interests are to be adequately protected and advanced. Few persons nowadays speak up for what Theodore

[2] Ronald Reagan, Presidential Remarks to the New York City Partnership, 14 January 1982 (reproduced); William J. Baroody, Jr., "America: A Nation of Communities," in American Enterprise Institute, *Memorandum* (Spring/Summer 1985): 4; and William A. Schambra "The Roots of the American Public Philosophy," *The Public Interest* 87 (Spring 1982).

[3] Burton Yale Pines, *Back to Basics* (New York: William Morrow, 1982).

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Lowi dubbed "interest group liberalism" (the nation as holding company for a myriad of self-seeking groups). However, there are a number of persons who now argue, mainly on the basis of intensifying international economic competition, that the nation must function as a more permanent and focused commonwealth of aggregated interests.[4] Business and labor, farmers and consumers, Rustbelt and Sunbelt, public and private organizations—the great interests in American society risk losing the long-term mutual advantages to be gained through cooperation because of their short-term preoccupation with adversarial posturing. National planning among the affected and recognized interests (*not* the creation of a national plan by government) is what is called for in this vision of national welfare. Finally, some see the nation as struggling to become a single national community, a community with variations, of course, but one that ultimately subsumes regional, ethnic, class, and other variations under the larger commitment to a common and equal social citizenship. Ideally, government social welfare programs should serve as a means for expressing the social solidarity of this national community.[5]

These competing visions suggest the range of ideas that are in the air today. Underlying this ferment is a feeling that something has gone wrong, seriously wrong, with Americans' self-understanding as a political society. The trouble has been variously diagnosed in recent years. Some trace the problem to a loss of moral and religious bearings brought about by liberal secularism.[6] Some see a rampant individualism that has overwhelmed the norms of civic virtue and public-mindedness that inspired America's founding.[7] Some cite the moral bankruptcy of a predominately market-oriented capitalist order.[8] Others call for a rededication to the inherently moral content of democratic capitalism.[9]

Reflecting on these crosscurrents it is easy to become perplexed and, perhaps, a little cynical about political appeals to the general welfare. Neither does consulting the Founders' and the Constitution's use of the "general welfare" clause (Art. 1, sec. 8) help very much. The meaning of the clause has been disputed since the debate ratifying the Constitution and under modern judicial interpretations the "general welfare" is taken to mean virtually any purpose for which Congress chooses to exercise its taxing and spending powers.[10] The Constitution simply invites us to puzzle over the meanings we will use to define ourselves as people.

[4] Theodore J. Lowi, *The End of Liberalism* (New York: Norton, 1979). The more recent formulations are represented by Felix Rohatyn, "Reconstructing America," *New York Review of Books*, 5 March 1981, 16–20; and Leon Lindberg and Charles Maier, eds., *The Politics of Inflation and Economic Stagnation* (Washington, D.C.: Brookings Institution, 1985), 581–85.

[5] Samuel H. Beer, "The Idea of the Nation," *The New Republic*," 19 July and 26 July 1982.

[6] Richard John Neuhaus, *The Naked Public Square* (Grand Rapids, Mich.: Eerdmans, 1984).

[7] Robert N. Bellah et al., *Habits of the Heart* (Berkeley: University of California Press, 1985).

[8] Claus Offe, *Contradictions of the Welfare State* (Cambridge, Mass.: MIT Press, 1984); Daniel Bell, "The Cultural Contradictions of Capitalism," *The Public Interest* 21 (Fall 1970).

[9] Michael Novak, *The Spirit of Democratic Capitalism* (New York: Simon and Schuster, 1982).

[10] Laurence Tribe, *American Constitutional Law* (Minneola, N.Y.: Foundation Press, 1978), 248–49.

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Amid all of the intellectual counterclaims and turmoil of recent years, it is worthwhile recalling that the American political tradition has always embraced two rather different conceptions of welfare. Each has been competing for primacy throughout our history and neither has ever entirely prevailed over the other.

Two Concepts of Welfare

Given his delight in American paradox (sensing a political society of rampant individualism and chilling uniformity, conviviality, and estrangement), Tocqueville would surely have relished Americans' current love-hate relationship with their particular version of the welfare state. If one looks at the raw statistics, it appears that the United States today is not very much out of line (as it was, say, in the Eisenhower years) with many western European nations in terms of social welfare spending, taxation rates, and the whole array of public sector interventions blurring the conventional boundaries between public and private spheres.[11] Notwithstanding the cutbacks of the Reagan years, America remains in many ways a highly developed welfare state. It is, however, one filled with self-loathing. "Government interference," "bloated bureaucracy," "public handouts to the undeserving"—these are some of the things Americans rail against even while they simultaneously demand improved public services, protections against the insecurities produced by economic markets, and ironclad guarantees for social security benefits. Public opinion surveys simply confirm the ambiguities each of us often feels when it comes to a socially-engaged federal government.

This ambiguity can be traced to the fact that the American political tradition embraces two competing concepts of the general welfare. These two concepts can be found in uneasy tension with each other in any of today's advanced democracies, but the American political tradition is fairly unique in that it unhesitatingly affirms both welfare concepts. Indeed it sanctifies and elevates each into an article of faith concerning what it means to be an American.

The first concept might be called "welfare as self-sufficiency." It is a conception of wellbeing that is supremely individualistic, for it has to do with the capacity of an individual to go his own way, to enjoy the fruits of his own labor, to be unbeholden, unentangled, able to make it on his own. To paraphrase President Reagan in a recent Fourth of July speech, we Americans do not get together to celebrate Dependence Day.

There is no need here to review the familiar story of the liberal tradition in America. The idea that welfare is to be discovered in spheres of personal autonomy had ancient philosophical lineages prior to any writings by John Locke. In the American context this conception of welfare became readily identified with the protection of the individual against arbitrary government power. Indeed, Americans have remained deeply suspicious of even non-arbitrary govern-

[11] Organization for Economic Cooperation and Development, *Social Expenditure, 1960–1990* (Paris: OECD, 1985) 30.

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ment power infringing on individuals' lives, liberty, and property; or as the Founders modified the last term in Locke's formulation—one's pursuit of happiness. The American tradition affirmed not a right to happiness but to its pursuit, each person in his own way.

The view of welfare as self-sufficiency can be interpreted in many different ways. At one level it can be the glorification of egoism and unrelenting selfishness. At another level it can be interpreted to reflect an agnostic, skeptical view, a kind of Enlightment wryness contending that no man is fit to define the Good for others; in some circles today this is termed procedural liberalism. At still another level, welfare-as-self-sufficiency represents an extraordinarily bold testiment of faith in ordinary people's ability to know their own minds and to act as free-standing, sensible agents of their own destiny.

Whatever one's perspective, the point is that this individualistic conception of welfare closely corresponds to a regime of both civil liberties and also modern versions of market-oriented, economic rationality. Such economic rationality implies something more specific than the literal meaning of rationality—the making of ratio calculations between means and ends. It is a view that assumes economic rationality is everywhere and always a matter of individual calculations for maximizing individual utility. Thus visions of the independent, free-standing American proved to be fully compatible with the development of a commercial republic and its attendant doctrines: the free contract and mobility of labor, the inviolability of capital as property, the legal personhood of corporations, the sovereignty of the individual consumer in a mass continental market, and so on. Tocqueville was only one of many visitors who have been struck by the American's single-minded pursuit of material accumulation. From this perspective it becomes easy to view social welfare as the summation of the particular welfares generated as each American makes his or her own way in the world, each pursuing his own fortune and dreams of the good life.

The second concept might be termed "welfare as mutual dependence." If the first concept is tied to individualistic economic rationality, the second has to do with a social or group-oriented rationality. The first concept asks, to put it bluntly, "what's in it for me? Why should I not live as I like?" The second concept poses the kind of question that some of us can probably recall from grade school days. To be caught grabbing the largest share of toys or pushing ahead in line was inevitably to be confronted with a teacher's rhetorical question: "What would happen to us if we all acted that way?" This is not a question asking us to choose between rational individualism and all other behavior that is somehow irrational. It is a question asking us to apply rational criterion to the self-in-group rather than to the self-in-isolation as the point of reference.

Of course, within the confines of classical economic reasoning there is an answer compatible with the first conception of self-sufficient welfare, though it probably would have little impact on one's grade school teachers. The answer of economic individualism is that if each of us pursues his or her own immediate interests and engages in exchange, we will inadvertently meet each other's needs. The answer applicable under the second concept of general welfare (and most

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teachers in charge of a squirmy collection of young children are likely to have a strong orientation toward group management) is that by thinking only of ourselves we will surely tear ourselves apart as a functioning collectivity.

In the past generation it has become increasingly common for Americans to define welfare as self-sufficiency, to view their personal independence as a source of well-being.[12] Demands for personal growth and liberation, a popular culture of self-expression, political appeals ("are you better off than you were four years ago?") and commercial injunctions to "have it your way" have all seemed to push in the same direction. Today it takes a special effort to appreciate the idea of personal welfare expressed through enduring group attachments. And yet since its birth, the American republic has frequently undertaken measures affirming a conception of well-being attained through mutual dependence. In the nation's early years, such actions were often hostile to the development of industrial capitalism and its preoccupation with individualistic economic rationality. Both colonial and post-Revolutionary practices frequently compromised individualistic welfare by providing for shared public use of private property (for pasturage, hunting, wood gathering, and the like), by regulating its transfer, and on occasion by seizing it altogether. Intervention by state and local governments in what many today would regard as private economic transactions was pervasive in colonial America. At their heart, these interventions were certainly not based on any desire for increasing government power; rather they flowed out of a conviction that values intrinsic to the community determined whether an economic transaction was inherently fair or unfair. The mere fact that the parties consented to a contract was not regarded as sufficient to determine fair value. Thus government authorities in many places could be found limiting interest rates and setting prices for essential goods such as bread or essential services such as milling, innkeeping, and ferrying.[13]

We should not imagine that the concept of general welfare as mutual dependence was nothing more than a carry-over of premodern agrarian values and institutions. It also drew strength from what was then the most up-to-date thinking on the conditions necessary for a successful republic and from Americans' historic experience.

By the late eighteenth century, leading American statesmen had fully absorbed Montesquieu's and others' ideas concerning a stable republic's need for mixed and mutually constraining powers. Before that time, the problem of designing a workable republic had seemed insoluble if one accepted two quite reasonable premises. Given first, that men were by nature often ruled by their passions rather than reason, and second, that in a republic all citizens were to have a share in ruling, what restraint could prevent political disintegration? Not the coercive power of government, or else the second premise would be lost. Not the hope

[12] Joseph Veroff et al., *The Inner American* (New York: Basic Books), 535.

[13] Jonathan Hughes, *The Government Habit* (New York: Basic Books, 1977). See also Robert Goldwin and William Schambra, eds., *How Capitalist is the Constitution?* (Washington, D.C.: American Enterprise Institute, 1982).

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that men should subordinate their passions to their reason, or else the first and very realistic premise would not hold. The answer, of course—widely shared and essential in the American political tradition—was neither to return men to being government subjects nor to try and transform them into angels. The answer was to counteract passion with passion, ambition with ambition.

By invoking the idea of mutual checking by self-seeking individuals, have we not simply returned to the concept of welfare as self-sufficiency? Not really. Montesquieu's and the Founders' hope was not simply to set the passions of one individual against those of another person. Their aim was also to set different types of passion or sentiments against each other within the same individual. Restraint and occasional self-denial could be obtained by counterbalancing self-regarding passions with group-regarding passions in the same citizen. The latter passions Montesquieu termed political virtue: ". . . a very simple thing. It is the love of the republic."[14]

Beyond questions of theory, the shaping political experiences of the country have embraced powerful surges of group-regarding sentiments in certain periods. Nationalistic fervor during times of war has been the most obvious example. However, it would be missing the point to imagine that what occurs is simply some pendular movement in history, an alternation of self-regarding and group-regarding epochs. Neither can one write a story that will withstand historical scrutiny to the effect that there was some earlier era of civic virtue from which Americans have progressively degenerated into a Me-Generation. Americans as a people were *born* imprinted with the polarity between welfare as self-sufficiency and welfare as mutual dependence. Their Revolution was a collective effort, hesitatingly undertaken, to create one union from many parts, but a union dedicated to assuring the primacy of its smallest part—the individual and his liberty. Their Constitution, as opposed to the pre-1789 Articles of Confederation, was and is a design for mutual responsibility rather than a self-cancelling distribution of power among a collection of parts. Their Civil War was fought, at least in part, to impose a more collective vision of individual freedom on the regime's components. In other words, the American formula is thoroughly reciprocal; from Many to create One, and to use this more perfect Union to enhance the individuality of the Many. The two concepts of welfare represent a true polarity, a permanent dualism, rather than a Marxian "contradiction" that must be resolved in one way or another.

The American tradition, therefore, encompasses two concepts of political purpose that are in persisting tension with each other. The same ambiguity present at the founding can be found today in "The Inner American," in his or her "Habits of the Heart," in his or her sense of "What's Fair."[15] Under the concept

[14] Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent, vol. 1 (New York: Hafner Press, 1949), 40.

[15] These titles refer to Veroff, *Inner American*; Robert Bellah, *Habits of the Heart*; and Jennifer Hochschild, *What's Fair?* (Cambridge, Mass.: Harvard University Press, 1981). See also Herbert McCloskey and John Zaller, *The American Ethos* (Cambridge, Mass.: Harvard University Press, 1985).

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of welfare as self-sufficiency, government is a largely negative mechanism to protect equally, despite the unequal resources and capacities of each person to go his own way. Under the concept of welfare as mutual dependence, government is a positive force expressing and linked organically to our self-identity. The first orientation presents us with an individualism constantly threatened with entropy by group pressures; the second shows us an individualism that acquires meaning only through the shared understandings of group membership. Both concepts are equally legitimate in the American context. It is only because the latter has become somewhat unfashionable to talk about in an anti-Washington era that it has been given particular emphasis in this article. The words of George Washington's Farewell Address capture the issue as well as any. After expressing his gratitude for the chance to serve and saying that he should perhaps end his speech there, the retiring President went on to add "the disinterested warnings of a departing friend":

> The unity of Government, which constitutes you one people is also . . . a main pillar in the edifice of your real independence, the support of your tranquility at home, your peace abroad; of your safety; of your prosperity; of that very Liberty, which you so highly prize . . . . The name of AMERICAN, which belongs to you, in your national capacity, must always exalt the just pride of patriotism, more than any appellation derived from local discriminations. With slight shades of difference, you have the same religion, manners, habits, and political principles. You have in a common cause fought and triumphed together; the Independence and Liberty you possess are the work of joint counsels, and joint efforts, of common dangers, sufferings and successes.[16]

Having made this appeal to group-oriented sentiments (or if you will, passions) Washington then went on in typically American fashion to show how the same conclusion flowed from more immediate calculations of sectional self-interest.

The argument to this point has been to try and show that two concepts of welfare are both deeply embedded and cherished in the American political tradition. The entire edifice of our social welfare policy—from social security to child nutrition programs—has been built on a host of cross pressures between the striving for personal independence and the attachments of mutual responsibility. And it is from such a base that the American welfare state will move on to the next century.

The General Welfare Dilemma

In event of a nuclear attack on Washington, the parchment symbols of our political tradition—the original Declaration of Independence, Bill of Rights, and Constitution—will be lowered into a fifty-ton heat- and blast-proof vault. This process will be set in motion via a signal conveyed on a Pentagon hotline to the guard's office at the National Archives building. The plan then calls for the guard on duty to hurry to the Archives' rotunda and press a switch near the dis-

[16] *Messages of the Presidents of the United States* (Columbus, Ohio: Jonathan Phillips, 1841), 71–72.

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play case to lower the documents into their leaden shelter. The chain of operations will depend on that individual guard—in all likelihood a poorly educated member of a racial minority working at somewhat above the minimum wage—when informed of nuclear attack, thinking first of protecting the symbols of our collective life as a nation and not of running for cover or calling his family to escape Washington. Will it be his or her individual- or group-regarding passions that will prevail?

All of us live at the intersection of tensions between these two concepts of welfare. Each expresses a legitimate and deeply-held set of values, neither of which we are willing to abandon. Ultimately, the welfare state is an affirmation of the inconsistencies or "failures" we are willing to endure in order to preserve each set of cherished and often irreconcilable values.

The essential problem is that choices must be made, and yet any choice tends to leave us trading off one set of unrelinquishable values against the other: living for one's self versus living through others, taking personal responsibility versus accepting mutual responsibility. The particular manifestations of this dilemma dominate our day-to-day conversations about welfare policy. How much can others be helped before they stop being willing to look after themselves? How much should social adequacy count as against individual economic incentives? Typically, Americans seem to worry most about such questions in relation to benefits for the poor. Welfare benefits or public assistance that are high enough to give adequate assistance to the truly needy will inevitably attract others to cut back on their work efforts, encourage misrepresentations so as to qualify for benefits, and so on.

Several things are worth noting about this formulation. In the first place, the dilemma is not peculiar to welfare defined as cash and services for the poor. *Any* government benefit with qualifying conditions can be expected to create incentives for people to change their circumstances so as to meet the stipulated conditions for its receipt. Whether one calls this manufactured eligibility, substitution effects, or the moral hazards of insurance, the point is the same. Although such effects happen all the time, we seem to find it more objectionable when poor persons behave in such a way than when rich people do. For example, a past issue of a biweekly publication called the "Doctor's Tax Letter" points out how the 1981 tax changes introduced in the first year of the Reagan administration allow business deductions that can reduce the costs of vacation travel in conjunction with professional conventions, of bringing wives on business trips, and of business-related meals served in the home. It is a good bet that in consequence the early 1980s saw more wives taken to medical association meetings and more invitations for home cooking. Likewise, today's omnipresent ads for tax-free savings have apparently had a similar effect, namely very little increase in net savings and a large amount of fund-switching to IRAs and so on in order to qualify for the government's tax benefits. None of this means we should stop providing tax breaks to doctors and savers or welfare payments to single-parent families. It simply means we should be conscious of the indirect and often unintentional effects of government activities on poor and non-poor alike.

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A second thing worth noticing about the dilemma of social solidarity and individual incentives is that it is not some problem to be solved by infusing policy making with more rational economic analysis. In a world of strict, individually-based economic rationalism, it is true by definition that welfare payments will cause income-maximizing individuals to change their behavior. It is also true that no "rational" Economic Man will voluntarily contribute to an endeavor in which his benefits and costs are indistinguishable from those of other persons (the "free rider" problem). This is a formulation of the issues that simply serves to demonstrate its own premise—namely, welfare as self-sufficient individualism.

The actual problems of choice are much more interesting and agonizing than the premises and reasoning of economic individualism would allow. In 1946 George Stigler published a seminal article sketching the first idea for a "negative income tax" program—a positive cash payment to earners whose taxable income falls below certain levels).[17] Some years later this idea was popularized by Milton Friedman and others as a more efficient work incentive approach to replace the existing hodgepodge of welfare programs. But as Stigler had quite clearly and correctly observed at the outset, *any* unearned addition to income, including a negative income tax payment, must constitute a disincentive to work. The best one can hope for from careful program design is to reduce the disincentive to work, which is not the same thing as offering a positive incentive. The point of Stigler's observation is that we redistribute income and access to services because we believe there are other values to consider in addition to any disincentive effect viewed through the lens of economic rationalism.

Why this urge to redistribute? The power of those who want something for nothing to get their way politically is part of the story, but in many cases it is only a small part. In one way or another the redistributive impulse often finds its origins in deeper claims of mutual dependence and solidarity among individuals. At times we redistribute because we believe it is in some sense unfair to allow the costs of economic and social change (unemployment, pollution, urban or regional decay) to lie wherever they might happen to fall. It may be very difficult to determine who is at fault for such costs; and even if such a determination could be made, there may be no relation between the resources of those responsible and the needs of those affected. Sometimes we redistribute income and access to services because the inequalities generated by private economic markets seem too extreme or too prone to compound themselves, thereby threatening to break the bonds of shared membership in society. So, in effect, we set limits on how far economic inequalities should be able to buy other kinds of inequality.[18] Most of us would recoil at determining access to vital medical treatment by offering it to the highest bidder, although that was common in earlier times and

[17] George Stigler, "The Economics of Minimum Wage Legislation," *American Economic Review* 36 (1946): 365.

[18] Arthur Okun, *Equality and Efficiency* (Washington, D.C.: Brookings Institution, 1975) and "Further Thoughts on Equality and Efficiency," *Brookings Reprint* 325 (1977).

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is often still tolerated today by achieving the same result through less obvious means.

It is these kinds of tensions that produce the oddly stuttering, sideways advance of American social policy and Americans' love-hate relationship with their welfare state. It also helps explain why the ambiguous feelings are not aroused on equal terms by all social programs. Educational policy, for example, has customarily seemed to fit easily with welfare as both self-sufficiency and as mutual dependence. Educational advocates have been able to claim that public spending for schools offers both the skills needed by individuals for self-advancement and the informed citizenry required in a mass democracy. This seeming compatibility between the two faces of welfare goes far to explain the early and sustained lead that this nation has enjoyed over others in matters of mass public education. Unfortunately, that happy harmony of the past may not endure. As more social tasks (racial integration, bilingualism, programs for special-needs children) have been piled onto the public education system, the privileged status of public schooling has come under pressure from those who think they can strike a better deal privately. Health care has been an even more ambiguous case. There has been a growing view during this century that unequal health care for similar medical needs ought not to be among those things that money should be able to buy, at least not in vastly unequal shares. At the same time, there is a long tradition in health care of individual dependence on a powerful profession of medical experts with its own claim to independence as private service providers. The typical result has been a high level of ambiguity regarding the legitimacy of public controls, even over the public monies being spent on health care.

It is in the area of income maintenance that the tensions between our two concepts of welfare stand out most vividly. To take cash from one person and give it to another seems a sure recipe for confrontation. The answer in the United States has been to draw, relative to other countries, an especially sharp distinction between two types of income maintenance programs. The first, "insurance-type" of program has emphasized the norm of self-sufficiency. The second, "welfare-type" of program has emphasized dependency.

Insurance-based programs such as social security were created and have been vastly expanded with the popular rationale that individuals make contributions during their working years to pay for the benefits they will draw upon in the event of contingencies such as old age, disability, widowhood, unemployment, illness, and the like. If people believe they are in effect paying money to themselves, there is no need to invoke the second concept of welfare. In fact most recipients of social security, to take the largest insurance-type program, are receiving far more than they paid for. This bonanza will be smaller in the future as today's young workers receive a smaller payback relative to their contributions than did today's elderly. Still, the reality of social security is a norm of reciprocity and mutual dependence, an implicit contract between generations of wage earners and retirees. Today's and tomorrow's retiree does have a claim, but it is not to his or her own accumulated insurance benefits. It is a claim to some

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of the current income of the working population, and it is no stronger or weaker than the fact that the retiree in his or her working days did the same for an earlier generation of retirees. Similarly, contributions and benefits under social security are arranged in such a way as to give disproportionately larger benefits to lower-paid workers and dependents, with the result that insurance-based national programs lift far larger numbers of Americans above the official poverty line than do strictly welfare-type programs targeted on the poor. The public tolerance for such redistribution horizontally across generations and vertically among income groups presumably speaks to some idea of mutual dependence and social solidarity. Such programs have, of course, proven far easier to justify politically by appeals to individually-earned entitlements and "getting what you paid for." Even so, no one should imagine that changing the rules of the game—for example, to allow individuals thinking they can get a better bargain in the private insurance market to contract out of social security—would be a pure matter of individual, accounting book equity. It would also constitute an altered and more narrow vision of mutual responsibility in American society.

In contrast to social insurance approaches, welfare-type programs are customarily presented as dependence of a one-way variety. To define the "welfare" problem as cash relief for those who can pass an income test has the effect of dividing the world into two categories of people: those who are getting what they have not paid for and a much larger majority of people who are paying for something they will never get. Not surprisingly, this leaves the former minority politically vulnerable to any lack of forebearance on the part of the latter majority. For dependent welfare beneficiaries, the insurance metaphor offers little protection. Thus in the 1980s it has proven far easier to mobilize support for domestic spending restraint in the smaller fraction of the federal budget devoted to welfare-type programs than in the much larger portion of the budget having to do with so-called middle-class entitlements.[19]

This is not the place to argue the merits or demerits of particular spending policies. My point is a more general one. Steps may be taken to reduce certain program inefficiencies and economic disincentives, but social welfare policies are not a "problem" that in some final sense is ever going to be satisfactorily "solved." The worries preoccupying our daily policy debates are the reflection of a more fundamental difficulty. This difficulty arises from the fact that the American welfare state must express two deeply-held, equally legitimate, and often irreconcilable values of economic and social rationality—or if one prefers, individual-oriented and group-oriented passions. Some see the resulting structure of social policy as a hopelessly confused, logically inconsistent mess. However the same facts can be read in a more positive way, as an affirmation of the determination to preserve two highly valued, unrelinquishable but still very different concepts of general welfare.

[19] Hugh Heclo, "The Political Foundations of Anti-Poverty Policy," in Sheldon Danziger and Daniel Weinberg, eds., *Fighting Poverty: What Works?* (Cambridge, Mass.: Harvard University Press, 1986).

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Familiar Myths in an Uncomfortable Future

After six years of conservative government in Washington and a subordination of almost all other policy concerns to a mounting deficit problem, the core functions of the American welfare state appear to remain intact.[20] The continuing national referendum on the federal budget has usually trimmed but not eliminated programs for the poor and non-poor. Of course, the power of beneficiary groups has had much to do with that fact. But so too has the underlying body of public values that has made it politically infeasible to simply pull the plug on federal assistance and impose norms of self-sufficiency on millions of Americans. The recent resort to an arbitrary formula for budget cutting (i.e. Gramm-Rudman provisions) has only highlighted the political anguish aroused by any suggestions of dismantling the American welfare state.

Americans tolerate and persevere with their troublesome social policies, not because people feel terribly satisfied with them or because there appear to be final solutions to the welfare dilemmas waiting to be discovered just over the horizon—though at times, as in the 1960s, we may delude ourselves into thinking that there are. In the end we persevere because there are fundamental values we are unwilling to sacrifice, even as we compromise them and muddle any consistent definition of our nation's social purpose. For many years, certain features of our environment have helped most Americans to live fairly comfortably with this inherent ambiguity.

One such feature has been the presence of a constantly replenished pool of persons who, while struggling to live up to the norm of self-sufficiency, have also been observably different from the rest of the population. Tocqueville's Indian on the roadside is an apt parable of their situation. Because these minorities of blacks, native Americans, immigrants, and so on have seemed so "different," it has been much easier to disregard their struggles and much harder to invoke norms of group solidarity in relevant social welfare policies.

A second feature helping Americans live with their welfare dilemmas has been our long-standing concentration on equal opportunity as an individual- and group-oriented goal. By worrying mainly about whether society has fairly drawn the starting lines in life's race, it has been much less necessary to argue about the fairness of results. This focus also has had the socially stabilizing effect of encouraging anyone falling behind to blame themselves for failing to make the most of the system's presumably equal opportunities.

A last characteristic worth noting here is that in a rich nation shaped by rebellion against arbitrary government, the values of personal fulfillment could realistically be associated with restrained and decentralized government. Traditional Americanism became an elegant blend of love for the political regime and distrust of government authority, a formula that fitted nicely with many business interests as industrialization proceeded. The fact that capitalism became part of

[20] Paul Blustein, "Reagan's Record: Welfare Statism is Intact," *Wall Street Journal*, 21 October 1985.

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the democratic mission helped in turn to assure that the solidarity inherent in the mutual-dependence concept of welfare remained confined to the politics of nationhood and hesitated at the borders of economic affairs.

Such a listing could be extended many pages, but these three features of our political life have helped in the past to obscure any tensions between values of self-sufficiency and mutual dependence. However, developments in more recent years have tended to work in the opposite direction, serving to intensify our underlying awareness of the welfare choices at stake. This may seem a strange observation to make in an apparently conservative era of government retrenchment. And yet, we should not mistake the political moods of the moment for the deeper currents in our ways of thinking about ourselves as a political society.

Because of many complex changes in our economy and the nation's position in the world, the norm of self-sufficiency is more and more running up against the reality of mutual dependence. It is doing so for many people and not just those who are somehow different from the rest of us. The only recent decimation of family farming, once the very symbol of American self-sufficiency, is only the most obvious example. Reality also intrudes when foreign economic competition undermines the economy of once-secure communities, when unemployment creeps into once-secure white collar and managerial occupations, or when seemingly affluent families find they cannot meet educational or medical costs, or the long-term care needs of their own aging parents. The norm of self-sufficiency suffers as family living arrangements become more unstable and more children and spouses are left to seek other forms of social support for themselves. The old norms suffer when young adults from middle-class families who have played by the rules of educational competition and done well still find they are without good job prospects. In a world of growing bureaucratization in the private sector no less than the public sector, the scope for rugged individualism can tend to shrink to the kind of designer jeans or musical tastes one exhibits.

The old goal of equal opportunity has become more a part of the puzzle rather than the simple solvent of our welfare problems that it once seemed. In a complex, interdependent society, the differences in economic results, the diverse fates of winners and losers, often seem to bear little relation to equal starting points or variations in individual effort. Experiences with well-intentioned government programs have shown how difficult it is to maintain any clear separation between concerns for equal opportunities, on the one hand, and equality, or at least equity of results, on the other. Unequal results at one time can produce unequal opportunities at a later time for the same individual. Often an inequality of results is visited on third parties, such as children, who then have difficulty in making use of whatever formal equality of opportunity exists for them. Such problems obviously raise choices about how far we should go in trying, as members of a common society, to influence the shape of results. On an even larger plane, they also call into question the whole notion of interpreting our life together as a competitive race: Do we owe each other something more than to abide by the rules of getting ahead? Is there more to our collective life than a mutual nonagression pact?

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Lifeless statistics can only faintly trace the kind of people we have become. New surveys show that on a monthly average at the end of 1983, roughly 30 percent of Americans were drawing benefits from one or more federal social insurance or means-tested programs. However, such mainly-cash payments are only the tip of the iceberg. A better sense of what has been happening can be gained by looking at a typical American community, in this case the famous "Middletown" that was studied by Robert and Helen Lynd in 1924 and 1935 and then revisited again by sociologists at the end of the 1970s.[21] What they find is an astounding growth in the federal presence during these years. In the depths of the Great Depression, 10 percent of the town's labor force held federally-funded emergency jobs and 25 percent of families received various kinds of public relief payments. After thirty years of almost uninterrupted prosperity in Middletown, the researchers find a clear majority of the town's families, poor and middle class alike, depending on the federal treasury for a significant part of their support, with about one-third of all the income received by Middletown families in 1979 coming from the federal government. A town budget thirty years earlier financed entirely by local resources is now boasting the federal government as its main contributor. Court rulings, agency regulations, financial inducements, and many other measures mean that there is very little going on in Middletown that is not somehow affected by the hand of a distant government.

And what kind of people has this produced? The researchers find no evidence of families more frequently falling apart, no declining work ethic, no growth in apathy or anomie, no breakdown in local authority structures. What they do find at all income levels, poor and business executive alike, is a host of complaints about government as bureaucratic, wasteful, ineffective. The expanding flow of public resources has elicited complaints from every quarter that one is not getting one's due. Americans, it seems, have been learning to love their government benefits and to hate their government.

What kind of people? At first glance it appears easiest to answer: a grumbling nation of dependent individualists. And yet the challenges to our society and to our self-conceptions are real, not imagined.[22] Under one definition, virtually 25 percent of American children under age eighteen in the mid-1980s were living in poverty, compared to a child-poverty rate of five to six percent in countries such as West Germany, Norway, and Sweden. Argument still rages regarding whether or not industrial change is shrinking the middle-class portions of the income dis-

[21] The national statistics are contained in the new Bureau of the Census *Current Population Reports*, "Average Monthly Data from the Survey of Income and Program Participation," Household Economic Studies, Series P-70, no. 1, Third Quarter, 1983, table C, p. 4. Middletown data is from Theodore Caplow et al., *Middletown Families: Fifty Years of Change and Continuity* (Minneapolis: University of Minnesota Press, 1982), 26–29.

[22] These figures are drawn from Timothy M. Smeeding, "Comparative Economic Status of Children and the Elderly," National Academy of Sciences Workshop on Demographic Change, Woods Hole, Mass., 5–7 September 1985 (reproduced); Sheldon Danziger and Peter Gottschalk, "The Impact of Budget Cuts and Economic Conditions on Poverty," Testimony before the White House Committee on Education and Labor, 21 February 1985, 4; Stephen Crystal, *America's Old Age Crisis* (New York: Basic Books, 1982).

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tribution, but there is little doubt that the portion of persons with low earnings, many of them service workers, has been steadily increasing for the past fifteen years. Nor is willingness to work always the issue. The number of working age Americans who worked but were still below the poverty line was 4.5 million in 1978 and 7.3 million in 1983; almost 2 million of these were poor, despite working full time all year. Typically, those who are above the poverty line are divided into two nations of workers: those with an adequate and often generous combination of private fringe and public benefits and those with meager and unreliable private health insurance, pension plans, and training facilities.

Among the elderly, improvements in social security and coverage of health costs mean that the aged as such no longer constitute a systematically poorer portion of the population. But that fact has only thrown other related problems into sharper relief. A substantial cleavage of inequality cuts across the elderly themselves; one study suggests, for example, that once underreporting of income is considered, the upper one-fifth of the elderly receive 57 percent of the elderly's total income, while the lowest-income 40 percent of the aged share only 10 percent of the total income. And too, the general improvements in the economic conditions of the aged and the continued high social security taxes facing today's young workers have set in motion new questions about contracting out of the system to obtain a better deal for one's self through tax-subsidized private savings.

Thus the chain of mutual obligation across generations and in other areas becomes more visible and problematic. What is it that the younger generation owes to its elders and what can they in turn expect in terms of support from the next generation of workers? What do the childless owe to those with children, if anything, and what support should aged parents expect from their children? What do regions favored by economic change owe to other regions bearing the attendant dislocations of such change? What obligations to work, to move, or otherwise to change behavior in some prescribed way should be attached in exchange for social support? Should such obligations apply to everyone, or only some people? And why?

A period of antigovernment sentiments in the 1970s and 1980s has only served to strengthen awareness of the difficult choices at hand. Seeking to cut back on the uses of government has sharpened the realization that government intervention and government inaction *both* represent choices about general welfare and are full of social meaning. If government continues funding for abortions or if it eliminates such funding, if it maintains or cuts back on child nutrition programs, if it seeks to revise or leave sacrosanct the social security system, if it treats disability claims in one way or another – whichever way the political cards fall, it is unlikely we will go back to the way of thinking of an earlier time and imagine that such issues flow out of some natural order devoid of conscious political choice. It should be added that the modern media goes far to sharpen our sensitivity to the choices being made from the perspective of both concepts of welfare; mass media coverage of our society encourages us to ask questions from

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the viewpoints of both rational individualism (am I getting my share?) and rational social empathy (am I part of a system in which people are being treated fairly?) If, as some social critics contend, we are becoming more individually self-centered, it is perhaps also true that we are becoming more collectively self-conscious.

There are important similarities between our own times and the 1880s, when this journal was founded. Both are periods when social relations seemed to be in flux. Common understandings and reference points appeared to be being lost, and a gap was widening between prevailing theories and prevailing practice. In such times competing visions were deployed in an attempt to make sense of the surrounding confusion. At the outset of this article, I suggested some of those attempts today, and it is not difficult to find counterparts in the 1880s. Henry George and the single-tax movement represented an uncompromising individualism, while Edward Bellamy and the Nationalist movement were extreme collectivists in their vision. It was a time when Andrew Carnegie preached the inseparability of American capitalism and the nation's democratic mission; John Dewey sketched the first version of his ideas; and William Graham Sumner taught that, "Socialism is any device or doctrine whose aim is to save individuals from any of the difficulties or hardships of the struggle for existence and the competition of life by the intervention of the State."[23] By this standard there must be very few non-socialists left in the country today.

Times, of course, have changed, and today's challenges to our concepts of social welfare are scarcely as violent as the social upheavals of one hundred years ago. But the basic conceptual tools we possess to deal with these challenges have probably not changed as much as we might think. Nor are the intellectual responses likely to be straightforward. The more the facts of interdependency impose themselves, the more urgently may Americans try to compensate by grasping for a mythical self-sufficiency. The more that distant forces and large-scale public and private bureaucracies seem in control of our life chances, the more we may seek solace in various forms of socially-detached intimacy and simple-minded assertions of "traditional values." Our great strength as a national society has lain in our historic insistence on a welfare vision embracing norms of both self-sufficiency and mutual dependence. Our great danger has been the temptation to take the easy path and view individualism solely as a gospel of self-centeredness. It is the checks and balances between the two concepts of welfare that sustain us. And it was with an eye to the dangers of losing that balance that Tocqueville completed his notes on the American "wilds" with the warnings of a friend:

> This unknown man is the representative of a race to whom the future of the new world belongs. A restless, calculating, adventurous race which sets coldly about deeds that

[23] William Graham Sumner, *The Forgotten Man and Other Essays* (New Haven: Yale University Press, 1918), 79.

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can only be explained by the fire of passion and which trades in everything, not excluding even morality and religion. . . .

A nation of conquerors that submits to living the life of a savage without ever letting itself be carried away by its [nature's] charms, that only cherishes those parts of civilization and enlightenment which are useful for wellbeing and which shuts itself up in the solitudes of America with an ax and a newspaper; a people who, like all great peoples, has but one thought and presses forward to the acquisition of riches, the single end of its labors, with a perserverance and a scorn of life which one could call heroic. . . . It is a wandering people whom rivers and lakes cannot hold back, before whom forests fall and prairies are covered in shade, and who, when they have reached the Pacific Ocean, will come back on their tracks to trouble and destroy the societies which they will have formed behind them.[24]*

[24] Tocqueville, "Fortnight in the Wilds," 742–43.

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The Welfare State: Ethical Foundations and Constitutional Remedies

THEODORE J. LOWI

In 1935, the United States Congress enacted and President Franklin D. Roosevelt signed into law the basic titles of the social security system, thus taking the revolutionary step into the welfare state. Yet, there was hardly a sense of revolution anywhere in the United States. Although there was some fear in that summer that violence might erupt if Congress remained inactive, there were no deep social class or sectional divisions over the welfare state despite the novelty or the scale of commitment. The political struggle in Congress was not over whether to have a welfare state but over what kind of program it would be.

In 1965, Congress adopted Medicare and Medicaid. These were the two largest expansions since 1935, and they were going to continue expanding very fast because of the method of third-party financing whereby the doctor and the patient agreed on the service and the government underwrote the charges. In 1969, Congress expanded the food stamp program and made it a regular, rather than experimental, part of the system of comprehensive social support. This meant that three of the largest commitments the United States ever made to the welfare state were made as maturity was approaching (which for any pension or insurance system is thirty–forty years); were commitments to persons structurally outside the work force; and were made at the moment when the ratio of taxpayers to welfare beneficiaries had dropped from 18–1 to less than 4–1.

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In 1972, Congress passed an across-the-board 20 percent increase in the social security benefit base and then made benefit increases automatic rather than subject to annual reconsideration by Congress through the enactment of the cost-of-living index (COLA). Two years later, President Richard Nixon's Supplemental Security Income (SSI) was adopted, nationalizing a uniform minimum benefit for those elderly poor not covered by social security.

In 1973, the Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds forecast long-range deficits in trust funds, thereby officially recognizing what came to be known as the "social security crisis."

The purpose of this article is to try to understand how an anti-statist country could commit itself to a welfare state without any sense of revolution and could expand it to a point of virtual national insolvency without a sense of crisis. The analysis will be guided by a four-part hypothesis: that the public philosophy guiding all public policy in the epoch of the New Deal extending into the present was a liberalism based upon a very special ethic of communal or socialized responsibility that became the functional equivalent of a state in a stateless society; that this ethic fueled and justified the welfare state; that this ethic possessed the seeds of its own undoing; and that the necessary reform and restabilization of the welfare state will rest less upon the economics of cost and benefits and more upon the politics of understanding welfare-state ethics and recognizing the inherent limits as well as the strengths of the welfare state. Friends of the welfare state should lead the reform.

The Ethical Basis of Welfare State Liberalism

Every society must develop a coherent position toward the problem of how to allocate responsibility for the injury and dependency of its citizens. Yet, since many positions may coexist at any given point and may be in competition for dominance, the prevailing ethic is next to impossible to capture and describe with any confidence. But the attempt ought to be made because of the importance of these shared values for understanding the choices of elites, the zone of tolerance of the money providers, and the level of acceptance of the service demanders. The most appropriate method for trying to capture the prevailing ethic comes closer to that of archaeology than to the social sciences because it is necessary to sift through the fossil remains and bone fragments of past choices in order to piece together an approximation of the ethical animal.

I propose to explore four realms of social life that are more accessible than the society at large and are richer in explicit ethical language than the language at large. No one realm and no particular ethical proposition will be taken directly as a description of the ethical state of affairs of the society at large. The focus will instead be on patterns—repeated and characteristic patterns of expression, and changes in those patterns.

The realms selected are: legal rules; social science theory; corporate authority;

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DIAGRAM 1

Phases in Attitudes Toward Allocation of Responsibility in Three Realms

1. Legal Rules (from blame to cost to social cost)	*2. Social Science Theory (from individuality to interdependence to systems)*	*3. Corporate Authority (from Andrew Carnegie to Dale Carnegie)*
Precapitalist—communitarian, organic, protect the passive party	Presocial science	Pre-corporate
Discrete individual; tort law; blame and fault; personal liability	Discrete individual; free will, personal responsibility; status to contrast	Discrete owner; property as dominion, "use-value"; "economic man"; ownership as basis of authority. Image: Andrew Carnegie
Proportionate and comparative negligence; balancing	Dependent individual, impersonal forces; institutions and markets	Corporation as person; dispersion of ownership, ownership; "limited liability"
Cost and its allocation	Interdependence; multiple causation; social science as science	Property as continuum; interpenetration of corporation and society; interpersonal and organizational basis of activity
Risk; negligence plus ability to pay	Causal models and correlates determining behavior; beginning of systems thinking	Socialization of risk; indemnification of injury. Image: Dale Carnegie
Risk/benefit; ability-to-pay plus ability to prevent; "public interest;" "social costs"	Systems thinking; new, accommodationist theory of consent ("interest-group liberalism")	Bureaucratization of authority; acceptance of welfare state
No-fault	No-fault	No-fault

national government regulation. The following are the results of my preliminary investigation into the languages of each of the four realms. Diagram 1 is an attempt to summarize the developments in each (vertical) and the parallelisms across three of the realms, including the ethical corners each has turned.

The Law: From Private Blame to Social Cost

There is little agreement and much controversy among jurists over what in fact were the prevailing legal rules and their significance during the century or more preceding the welfare state. Morton Horwitz and Lawrence Friedman, for example, have argued that the issue of responsibility for injury and dependency in

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the legal realm was resolved consistently in favor of the employer/proprietor, with the victim bearing most of the burden of industrialization and mechanization.[1]

This position has been lustily attacked not only by such Chicagoans as Richard Epstein[2] but by many mainstream students of the history of tort law, such as Friedman's Stanford colleague, Robert Rabin,[3] and G. Edward White in his meticulous *Tort Law in America*.[4] However, a closer look reveals that their controversy rages over whether there is a social class bias in the nineteenth century legal rules and not over the legal rules and principles themselves. On the latter, there is actually substantial agreement.

What can be discerned from this controversy is that there were definitely some identifiable legal rules in the nineteenth century and that the common law courts were regularly using those rules, albeit inconsistently, to handle cases by the hundreds in which responsibility for injury and dependency was being allocated. If there was no single pattern of bias in favor of the victim or the employer/proprietor, this was not because of the absence of rules, but because the courts were attempting to balance conflicting claims with multiple rules. From the perspective of this study, the fact that such rules existed at all, whatever the balance or the outcome of cases, is itself productive of a fairly clear ethical pattern.

Column 1 of Diagram 1 highlights the agreements among the jurists as to the character and development of important legal rules that attempted to allocate responsibility for injury and dependency. There seems, for example, to be agreement among legal scholars that the precapitalist epoch of American law, which lasted well into the nineteenth century, was, ethically speaking, communitarian. Those were simpler times, where dealings were mainly among people in the same community rather than among strangers, and where agreements were consensual rather than contractual. Horwitz quotes an 1816 treatise to the effect that "the master's relation to the apprentice stood '*in loco parentis*.'"[5] Horwitz's critic Epstein conceded that "actions between strangers were governed by principles different from those applicable between parties to some consensual arrangement [and that for] accidents arising out of consensual arrangements . . . rested, if at all, upon [an implicit] promise by the defendant employer to compensate the plaintiff employee for the injuries sustained."[6] Communities themselves met the problem of responsibility informally, with few tort cases till the end of the 1830s.

[1] Morton Horwitz, *A Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977), 210; and Lawrence Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 416–17.

[2] Richard Epstein, "The Historical Origins and Economic Structure of Workers' Compensation Law," *Georgia Law Review* 16 (Summer 1982): 775–819.

[3] Robert Rabin, "The Historical Development of the Fault Principle: A Reinterpretation," *Georgia Law Review* 15 (1981): 925–961.

[4] G. Edward White, *Tort Law in America* (Stanford, Calif.: Stanford University Press, 1980).

[5] Horwitz, *Transformation of American Law*, 208.

[6] Epstein, "Historical Origins and Economic Structure," 780.

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Cases that went to court were generally treated with such communally oriented rules as: The passive party has the stronger right; conversely, responsibility should be borne by the party who set the action in motion; or, who can best bear the cost of the innovation or the development? Communal solutions such as these tended to be conservative, in other words anticapitalistic, since the burden of innovation and risk often fell on the innovator, the entrepreneur, the risk taker, the proprietor, the employer. Whether conservative or not, the pattern was communal.[7]

As mentioned, there were two related developments that would probably force a turning of an ethical corner in the law. One of those was the tremendous increase in the amount of commercial intercourse taking place among strangers. Another was the probably equally large increase in the number of serious accidents and concomitant conflicts. All this would put tremendous pressure on communitarian values. This has been recognized by social scientists as the change from status to contract. For my purposes, this meant a change from communitarian to individualized values. This did not necessarily mean that the burden of responsibility in the law could be cast away from the innovator/proprietor/employer directly to the victim. That is an empirical question on which the best of legal historians continue to disagree. But their disagreements over the bias in the new, individualized law should not mask the virtual consensus among the same scholars as to the individualization itself and to the important turning of the corner it represents.

One way to express the turning of that corner in the law is, according to Richard Epstein, the move from one major theory to another. The first theory, the pre-nineteenth century theory, is that of "strict liability [which] holds the defendant prima facie liable for the harm caused. . . ." The second theory holds that a plaintiff should be entitled to recover from a defendant only if the defendant intended to harm the plaintiff or failed to take reasonable steps to avoid inflicting harm.[8]

The second theory, the theory dominant throughout the nineteenth century in England and the United States, can be summarized as "no liability without fault." Horwitz, coming at this from the opposite side of the controversy over the bias in this nineteenth century system, makes exactly the same assessment as to the character of the ethical corner that was turned. Jumping off also from the concept of "no liability without fault," Horwitz observes that "whereas the presumption of strict liability had flourished in a society in which the typical tort

[7] Horwitz, *Transformation of American Law*, 84–101. Compare his treatment, as paraphrased in the text, with that of his critic Richard Epstein: "It is most likely that theories of strict liability were dominant during the formative years of the common law. But during the nineteenth century, both in England and in this country, there was a decided and expressed shift toward the theories of negligence." Richard Epstein, *A Theory of Strict Liability—Toward a Reformulation of Tort Law* (San Francisco: Cato Institute, 1980), 5. Strict liability "holds the defendant prima facie liable for the harm caused whether or not . . . the defendant intended to harm the plaintiff or failed to take reasonable steps to avoid inflicting the harm." Ibid., 5.

[8] Epstein, *Theory of Strict Liability*, 5.

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action involved the suit of inactive plaintiff who had been injured by an active defendant, . . . modern negligence made its first limited appearance as a question of causation or . . . who, in fact, had caused the injury." This development in American law contributed to the decline of "the common law assumption that individuals were presumed liable for all injury resulting from risk-creating activity, [directing] the law's focus exclusively to the immediate question of which party's carelessness had brought the injury about."[9]

This may sound like a Magna Carta for capitalists, but it isn't. Strict adherence to tort and to "no liability without fault" could just as easily favor the victim as the perpetrator, the passive party as the active party. There was no automatic class bias in tort law. What did happen, however, was the development of not one but several principles of negligence that enabled, indeed required, the judges to engage in a balancing of values and results between the plaintiff and the defendant—that is, between the injured party and the alleged perpetrator. I have been able to identify nine such balancing principles in the legal history literature, but I make no claim that these exhaust the possibilities. All nine of these are common law, judge-made principles, although in the course of the nineteenth century some statutory intervention did take place, especially with the ninth on the list. Seven of these arise directly out of tort litigation and one, privity, from contract. The ninth, incorporation, is outside the usual context of these discussions among jurists, but for our purposes here is of tremendous ethical significance.[10]

Contributory Negligence. Even where the employer/proprietor was clearly the active party and could, especially under traditional understandings, be held responsible for the injury, he could win the case if the injured party contributed to the injury, as for example by being in the wrong place, by show of evidence of drinking on the job, by not paying attention. According to Friedman, "if the plaintiff was negligent himself, ever so slightly, he could not recover from defendant. This . . . became the favored method by which judges kept tort claims from the deliberations of the jury."

The Fellow-Servant Rule. This is simply contributory negligence by a third party, such as a co-worker. In the law of agency, the principal is generally liable for negligent acts of his agent, as in the case of an innkeeper, who was held responsible if the servant robbed a guest or the bartender injured a client by selling him bad wine. "But this general rule was never extended to the factory and to the railroad yard workers."

Assumption of Risk. Also referred to as voluntary assumed risk, this principle covers situations where although some negligence can be shown on the part of the employer/proprietor, the victim may have to bear all the responsibility for the injury if the victim could have known that the job or the accommodation

[9] Horwitz, *Transformation of American Law*, 95–96.

[10] The most helpful source for this listing, especially for the tort principles, was Friedman, *History of American Law*, 409–427, 262–263. Friedman should not, however, be held responsible for my particular uses.

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was dangerous and nevertheless entered into it knowingly. "Ski at your own risk" or "work at your own risk" could be sufficient to absolve the proprietor/employer of all responsibility. In the workplace, the theory was that wages would eventually rise to reflect the extra added element of risk, that the price of railroad tickets would drop accordingly, and that the risk of being hit by a foul ball in the baseball park was a necessary part of the excitement of spectator sports.

The first three of these doctrines were the earliest reactions to a strict application of negligence and came into increasing use as balancing principles after the 1840s. The following four seem to have to made their appearance in litigation a bit later in the nineteenth century.

Comparative Negligence. Also referred to as proportionate negligence, it seems to have been an alternative welcomed by some judges to the black and white negligence approach and the contributory negligence alternative. As the argument goes, if the plaintiff's negligence was "comparatively slight" and "that of the defendant gross," the plaintiff might possibly still win some kind of settlement.

"*Last Clear Chance.*" An old doctrine revived in the late nineteenth century, this covers situations where the injured party may have been negligent but still might recover damages if it could be shown that the defendant could obviously have avoided the accident. The classic case was one in which the plaintiff unfettered his donkey and allowed it to roam on a public highway. The defendant's wagon, coming along "at a smartish pace," ran over the donkey and killed it. Although the plaintiff was obviously negligent for having placed his donkey on the road, the defendant had had "the last clear chance" to avoid the accident, thus canceling out the plaintiff's earlier negligence.

Res ipsa loquitur. "The thing speaks for itself" was a principle covering such instances where, if a train engine boiler exploded, the operator would be held liable even if no proof of negligence could be offered. The burden of proof would be on the employer/defendant to show that no fault was in fact involved.

Liability without fault. A throwback of the precapitalist epoch, this principle provided that juries could hold owners at fault if the owners had "set in motion some dangerous process," even where no negligence was shown. This is about as far as any court could go to introduce discretionary or balancing concepts, and it is no coincidence that such an approach came late in the nineteenth century and was more likely to work in favor of the passive party/employee/customer. It is also no accident that these judge-made doctrines of the late nineteenth century were obviated not by still later judge-made doctrines but by legislation, imposing an entirely different ethical commitment—turning another corner away from the individualistic nineteenth century doctrines toward another ethical pattern to be discussed below.

Privity. This important principle in contract law specifies that liability is limited to the first contracting party and not beyond. For example, the seller would be directly responsible to the first purchaser for an injury attributable to

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the product but not to the next customer or user of the same product, except under very limited circumstance. In the classic instance, in fact in a 1903 product liability case, an employee is injured by his employer's threshing machine. The court denied the claim against the manufacturer under the doctrine of privity because "the negligence of the manufacturer will generally be limited to the party for whom the article . . . is sold." The court went on to define certain exceptions, such as where that item had a real design defect, which the manufacturer knew about and kept secret from the purchaser, or where the initial purchaser was understood to be a "middle man" with every intention of passing the item along to other parties, as when a druggist buys pills for immediate resale.[11]

Incorporation. Intrinsic to the whole idea of the corporation is "limited liability," a legal concept with vast ethical implications. To incorporate is not to cast off all responsibility for injury but is to set limits upon the degree to which the owners of the corporation can be held liable.

Reflection upon these nine doctrines of balance and counterbalance in the business of negligence will leave one without any sense of puzzlement as to why legal historians are unable to agree on whether there was a consistent bias against the laborer or customer in the nineteenth century epoch of laws and policies governing responsibility for injury and dependency. The doctrines that judges contrived were a response to clear recognition of the community consequences of any decision they made; and, once articulated, these principles contributed to the crazy-quilt pattern of dispensation of justice. One would not have to examine thousands of cases to predict that there could be no pattern that would be statistically significant. However, although Epstein, Rabin, and White may have the better argument that the net pattern of impact is inconclusive, that does not mean that no patterns exist at all. As far as I can determine, there is one very clear pattern in all of this, and that pattern is *individualism*. To state the matter as clearly and starkly as possible: *The one ethical principle that cuts through all the doctrines governing the disposition of injury cases is individual blame and fault in the allocation of responsibility.* Until the very end of the nineteenth century, when one begins to discern the tendencies that will eventually develop into a full-fledged turning of an ethical corner, all the doctrines and all the balancing among conflicting doctrines seem to have in common an effort to apply some notion of *personal* blame and *individual* responsibility. The very effort to balance doctrines in order to take into account the community effects of decisions about the allocation of responsibility for injury and dependency ultimately contributed to the discrediting of the doctrines and practices themselves. In the United States it clearly led to arguments against the judiciary itself and to increasing and intensification of focus upon legislatures. Some legislatures got into the balancing act by abolishing the fellow-servant rule. Some legislatures adopted laws that explicitly regulated aspects of the relationship between labor

[11] *Huset v. Case Threshing Machine Company*, 120 Fed. 864 8th Cir. (1903). My thanks to Richard Epstein for providing me with this case and a succession of other relevant cases, some others to be referred to below.

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and employer, or passenger and common carrier. Some laws explicitly attributed responsibility for collisions or prairie fires without regard to showings of negligence. Some attempted to impose risk-reducing standards on factories; and even where no sanctions were provided for disobedience, the existence of the statutory standard could become part of an argument about "due care" in an ordinary judicial litigation. Some legislatures entered the balancing game by enacting workmen's compensation laws to partially indemnify injuries regardless of fault.[12]

These various efforts at balancing, especially the significant interventions by state legislatures toward the end of the nineteenth century, bring into dramatic relief the ethics of individual fault and blame underlying the legal theories and principles of the nineteenth century. At the same time, these balancing actions are the bridge or the prime casual factors back of the *decline* of the ethic of individualism and the rise of another set of principles altogether—principles that will, in the perspective of history, prove to be a full 90 degree turning of an ethical corner.

Once the ethical corner was turned, it soon became clear not only what was being turned away from, but what was being approached. One harbinger of the new direction was casualty insurance—or to put it more significantly, liability insurance. Well into the nineteenth century, the general attitude in the law was that people should not be able to insure themselves for injury caused by their own negligence. A treatise published in 1823 concluded that "an agreement by one party to indemnify another against losses voluntarily incurred seems to be so obviously opposed to the general interest of a community, that it could hardly be enforced by any legal tribunal." And there is the same objection, in smaller degree, against sustaining contracts to indemnify a man against the consequences of his own negligence.[13] The illustrious Chancellor Kent echoed this position in 1828, stating "the better opinion [that] the insurer is not liable for . . . damage [which] may be prevented by due care. . . ."[14] The latter obligation is all the more significant in that the judicial opinion he relied upon involved a New York case in which a marine loss arising out of negligence could not be covered by insurance. Marine insurance was, with fire insurance, the only important accident or liability insurance available in the mid-nineteenth century, and even this was kept within extremely narrow limits by established judicial opinions that discouraged to the point of absolute prevention the displacement or "socialization" of fault or blame. In other words, the attitude toward responsibility for injury was so individualized that the cost of an injury could not be shared.

In the 1830s, judicial opinion on this point had shifted to such an extent that even the U.S. Supreme Court upheld recovery of fire losses brought about through the negligence of the insured. Nevertheless, there remained considerable

[12] Some of these efforts are covered in Friedman, *History of American Law*, 419–23; and Richard Epstein, "Historical Origins and Economic Structure," esp. 787–800.

[13] Quoted in Horwitz, *Transformation of American Law*, 202.

[14] Quoted in ibid., 202.

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controversy among jurists on into the 1850s,[15] and there were no significant casualty insurance companies until 1864, when the Travelers Insurance Company was formed. By 1898, there were fourteen companies sharing casualty premiums of only about $11 million.[16]

Three court cases will help bring the situation up to date and pinpoint the nature of the corner that was turned. The first of these is the 1903 product liability case described earlier. This case, in which an employee injured by his employer's threshing machine could not, thanks to the doctrine of privity, reach the party of the first part, the manufacturing company. This was, after all, the epoch of the *Lochner* majority opinion, which relied entirely on the ethic of freely-contracting individuals. Since people are generally familiar only with the famous dissent by Oliver Wendell Holmes in the *Lochner* case, it will serve us well here to hear a bit from the majority:

> The statute interferes with the right of contract between the employer and the employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. . . . There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state. . . . They are in no sense wards of the state.[17]

In sum, contracts are voluntary agreements among individuals; legal duties such as the exercise of due care in the workplace can be modified or abrogated by contract, and, thanks to privity, the liabilities incurred under contract are limited fairly strictly to the contracting parties. All of this is perfectly logical, and it makes perfect sense within the ethical contexts of individualism and individual blame and fault. To ask "who's to blame" is not a necessary or compelling question, but to ask it is to reveal a very rich and highly specialized ethical base. This is what was going to change, as dramatized by the following two cases.

The second case is a case of the 1930s, even though this particular decision was not rendered until 1944. A waitress was injured when a Coke bottle exploded while she was handling it. Although she could show no sign of negligence on the part of Coca Cola Bottling Company, the court accepted her claim on the basis of the following argument:

> I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover. . . . [I]t should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence . . . public policy demands that

[15] Ibid., 202-203.
[16] Daniel J. Boorstin, *Democracy and Its Discontents* (New York: Random House, 1971), 82.
[17] *Lochner v. New York*, 198 U.S. 45 (1905).

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> responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. . . . The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. . . . However intermittently such injuries may occur . . . the risk of their occurrence is a constant risk and a general one. Against such a risk there should be a general and constant protection and the manufacturer is best situated to afford such protection.[18]

The ethical shift went far beyond what was necessary to handle the injury of the waitress. In effect it rejected the individual basis and the blame and fault basis of nineteenth-century principles.

The third case will clarify the extent as well as the character of the ethical shift. In this 1978 case, the plaintiff was injured while using a high-lift loader in a dangerous and uneven terrain, despite the manufacturer's printed and explicit warnings that the loader was designed only to operate on level surfaces. Moreover, the plaintiff was a substitute driver, because the regular operator had refused to work under such conditions, and, his substitute, the plaintiff, had been poorly instructed as to the character of the danger. Nevertheless, the California Supreme Court held for the plaintiff against the *manufacturer*, using what the court itself called a "risk-benefit" standard: The injured party "need not prove that the manufacturer acted unreasonably or negligently . . ." but only that the product falls "below ordinary consumer expectations as to safety. . . ." The case "must focus on the *product*, not on the *manufacturer's conduct*."[19] Moreover, the judge and jury should evaluate the effectiveness of the product in light of the product's "reasonably forseeable use" rather than its "intended use."

Clearly the ethical shift was profound. In effect there was a fairly thorough rejection of individual blame-and-fault principles of the nineteenth century. The direction in the development of legal doctrine was from private responsibility to public interest, from individual blame to distributional balance, from liability to risk, and from negligence defined as "no liability without fault" to the dropping of negligence altogether in favor of ability-to-pay spread, through insurance and through customer markup, toward the concept of "social costs." The last entry of Column 1, "no-fault," was inserted not because we have reached this level of socialized risk, but because no-fault is the limiting case of such an ethical system.

Social Science and Social Thought: From Individuality to Interdependence and Beyond

Americans did not have to know *Wealth of Nations* to resonate to Adam Smith's ideas. The Declaration of Independence and the Constitution were both built

[18] *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453 (1944).

[19] *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413 (1978). (Emphasis in original.)

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upon the individual's "pursuit of happiness." The Constitution is the world's most successful practical application of the contract theory of liberal philosophers from Machiavelli through Hobbes to Locke and Rousseau. Ours was a Constitution and a civil society built on greed, otherwise known as enlightened self-interest. It was individualistic to the core.

If *Wealth of Nations* was a popular bestseller at the beginning of the nineteenth century, Herbert Spencer's *Social Statics* was one of the most illustrious books of the end of the nineteenth century, and the rugged, brutal individualism of Spencer's point of view earned it recognition from on high. Justice Oliver Wendell Holmes in his famous dissent in *Lochner v. New York* (1905) singled out Spencer's individualism as a representation of the views of the majority in that case. So dominant was the individualistic point of view in that case and in the judiciary that Holmes was moved to state the opposite view as forcefully as possible: "The 14th Amendment does not enact Mr. Herbert Spencer's *Social Statics*." Holmes was probably correct for emerging public opinion when he observed earlier in his dissent that "this case is decided upon an economic theory which a large part of the country does not entertain." But he was probably a bit ahead of the situation in his own time, as this is described by intellectual historian Thomas Haskell. In his view, Spencer was a highly representative case study of virtually the whole generation of mid- to late-nineteenth century social scientists, who viewed the individual as the

> causally potent creature, normally master of his own fate and thus responsible for his own situation in life. Dependence . . . was an exceptional and pathological condition: One referred to the poor, the insane, and the crippled, altogether, as the "dependent classes." So powerful was the assumption of individual autonomy that even dependence was often thought to be caused by the individual himself: . . . Poverty could be viewed as an *effect* of vice (and certainly of imprudence and lack of thrift), and so could insanity or blindness or cholera. Since each man was ordinarily master of his fate, he himself . . . was seen as the primary cause of his place in society. If a man was of high position, that in itself was evidence of merit; if he was lowly, that showed a lack of merit. . . . God had so constructed the universe that merit was always ultimately rewarded and evil punished.[20]

The change away from individualistic social thought anticipated by Holmes's dissent probably received one of its strongest provocations from the discovery by Louis Pasteur and Robert Koch of the germ theory of the causes of disease. Germ theory may have had a normative effect on social thought comparable to the discovery of the New World and the confirmation of the theory that the world is round. There is tremendous ethical significance to the realization that individuals bear no moral responsibility for disease: We are all carriers, all victims, all murderers. People suffer illness, and possibly dependency, through no fault of their own. This is probably the first "systems idea" in modern social science history. And regardless of the extent to which it can be attributed to germ

[20] Thomas Haskell, *The Emergence of Professional Social Science* (Urbana: University of Illinois Press, 1977), 254.

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theory, the systems idea or some rudimentary version of it became the organizing assumption of the newly emerging social sciences. Haskell refers to it as "the assumption of interdependence," which he characterizes as "the decisive experience of the first generation of professional social inquiries. . . ."[21] To illustrate and confirm his observation, Haskell draws upon a number of founding fathers of the modern social science associations, which are the subject of his superb study. Richard Ely, one of the founding fathers of the American Economic Association (AEA), claims that AEA was organized out of the rejection of laissez faire and the embrace of interdependence: "More and more we are becoming increasingly dependent upon others, and more and more this dependence was becoming interdependence. The forces of life were getting beyond the control of individuals." Albion Small, a founder of modern sociology, considered that the justification of sociology lay in its sensitivity to what he called "vortex causation." Perhaps that is the first use of jargon in modern social science, but it is nevertheless significant, in as much as it captured for Small and many others the idea that "social causation more nearly resembles a chemical reaction than a cable transmitting an electric current. . . . [We] are convinced that every actual social situation . . . is a resultant of causal factors which run in on that center [vortex] from every point of the compass. . . ." Looking back from the perspective of 1927 on the founding period of the social sciences, John Dewey put his own eloquent stamp on the basic assumption of interdependence by his observation that "the new technology applied in production and commerce resulted in a social revolution . . . [It] is no exaggeration to speak [as Woodrow Wilson did] of a 'new age of human relations'. . . . The invasion of the community by the new and relatively impersonal and mechanical modes of combined human behavior is the outstanding fact of modern life."[22]

The important point here is not the influence of these views or their representativeness in the society at large, but their very existence as evidence of the timing and character of the value shift in professional social science and how these new values parallel the value shifts in legal developments. The onset of the change can be distinctly seen by the end of the nineteenth century. The character of the change was one from individual to collective, from concrete to abstract, from discrete linkages to system tendencies, and, eventually, from sensory experience to remote probabilities. The question of "who's to blame?" was becoming irrelevant—no longer an indication of the times but only a reflection upon the asker.

Corporate Authority: From Andrew Carnegie to Dale Carnegie

Andrew Carnegie is a good representative of the age of individualism in the economy. In the age of Andrew Carnegie, property and contract were absolutes. They were absolutes in the Constitution. More certainly they were absolutes in

[21] Ibid., 252.
[22] Ibid., 178–179, 252–253.

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the minds of property owners and most probably accepted by most nonproperty owners. Property meant autonomy. Property meant dominion.

But Andrew Carnegie is also a good representative of the break-down, or rather the break-up, of property as the modern capitalist epoch begins. First, incorporation itself softens the concept and the ethics of property by subdividing more and more property into larger and larger numbers of smaller and smaller units. With the advance of the corporation and of ownership through publicly traded shares, it is no longer possible to speak of ownership in absolute terms, as once owners truly owned their firm "lock, stock and barrel." With the advance of the corporation, ownership became more a matter of arithmetic than definition. With the corporation, the property atom was split into thousands and thousands of parts.

Capitalism "split the property atom" in still another way by separating ownership from control—that is, by conveying the property into ownership by relatively passive stockholders and maintaining an active control in the hands of a management that might or might not be major stockholders. In fact, the share of stock owned by management grew smaller and smaller. Meanwhile, owners were dispersed geographically to such an extent that few of them knew each other; and the greater the dispersion among stockholders, the greater the relative concentration among managers, and the smaller the proportion of total stock necessary to exercise control.[23] Thus, just as courts had come to speak of proportionate and comparative negligence, introducing a continuum of responsibility, and just as social scientists were speaking of interdependence, so also was capitalism reducing property to a continuum, indeed to an interdependent phenomenon, involving the interpenetration of the corporation and the social and political system.

Of even greater relevance to the analysis here is the equally profound transformation taking place inside corporate business organizations. Reinhard Bendix has observed that as ownership began to be dispersed in publicly traded shares in corporations, the authority structure within corporations came more and more to stress interpersonal and reciprocal relationships. This ultimately became part of business ideology as well as business practice. In a very important sense, business authority has become political—manipulative rather than authoritative, reciprocal rather than hierarchical. As long as the boss was the owner, the authority relationship could be asymmetrical. Without the ownership base, the very idea of the boss began to disappear. The concept of the worker changed drastically, such that by the 1920s,

> American employers were confronted with an unprecedented situation. The idea that incentive wages, threats, and instant dismissal were not sufficient to manage a workforce, that it was necessary to select and train workers on the basis of scientific findings . . . helped to undermine the employer's previous ideological certainty . . . [Workers] had been in bad repute. According to the Puritans, they were idle and dissolute and,

[23] A. A. Berle and G. C. Means, *The Modern Corporation and the Private Property* (New York: Macmillan, 1932), esp. 356.

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> hence, lacking in virtue . . . . Endless reiteration had confirmed the belief that workers were poor out of the evil purpose of their hearts; hence, poverty was a moral problem and a proper subject of moral exhortation. But in the course of the 1920s and 1930s the worker was to become the subject of scientific tests, whose attitudes and aptitudes had to be taken into account by management.[24]

Corporate practice and ideology changed also in regard to the hierarchy in the upper reaches of management. Corporatizing of ownership coupled with bureaucratization of the enterprise had rendered into an anachronism the absolute authority of the manager/owner, turning the exercise of authority

> into a task, for which staff work and committee work, the elaboration of rules, the delegation of authority, and the specialization of administrative function were indispensable tools. . . . Among American employers the superiority of industrial leaders was as unquestioned as ever, but it had become the subject of discussion as well as of celebration. . . . The authority of the manager was said to be a position of trust, not of personal power. . . .[25]

The analysis of management leadership was one of "personality salesmanship." As the high priest of the new management style, Dale Carnegie, was already putting it in the 1920s, "We are evaluated and classified by four things: by what we do, how we look, by what we say, and how we say it." The art of influencing people requires "tact, praise, modesty, and a little hypocrisy."[26] Management, as life itself, had become a matter of "winning friends and influencing people." When everything becomes a matter of degree, and when authority itself becomes interpersonal, the corporate animal begins to look a lot more like Dale Carnegie than Andrew.

A Fourth Realm: Regulation in the Welfare State

Diagram 2—first constructed in 1967 and published in 1969, just before the onset of the great regulatory surge of the 1970s—reveals striking parallels between the phases of regulatory policy history and the phases of general ethical development as displayed in Diagram 1. The phases on Diagram 2 were recognized in the late 1960s, but I had not then recognized the full significance of the general ethical context and how changes in that ethical context had fueled the changes in regulatory as well as welfare policy history.

A certain amount of lag time should be allowed between the phases of Diagram 1 and Diagram 2, because there was widespread doubt that the Constitution would permit Congress to reach anything that was not very narrowly formalistically defined as within the realm of "interstate commerce." But that in itself confirms one general ethic of the time, because the constitutional interpretation was highly individualistic. Then as we move into the twentieth century, es-

[24] Reinhardt Bendix, *Work and Authority in Industry* (New York: Harper Torchbooks, 1956), 288–289.

[25] Ibid., 297–302.

[26] Quoted in ibid., 303.

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DIAGRAM 2

The Development of Public Controls in the U.S.

An Analytic Summary

Scope of Control	*Objectives of Control*	*Developmental Characteristics*
A. The Railroads in Interstate Commerce (1887–)*	The railroads	concrete specific traditional rule-bound proscriptive
B. The Trusts (1890–)	Oil trust, sugar trust, liquor trust, cottonseed oil trust, etc.	concrete general† traditional rule-bound proscriptive
C. Goods (1906–)	Qualities of things. Substandard foods, impure drugs, immoral women, obscene literature, etc.	abstract specific traditional rule-bound proscriptive
D. Commerce (1914–)	Relationships. Competition, fair and unfair. Qualities of commerce.	abstract general traditional discretionary prescriptive
E. Factors (1933–)	Qualities of commodities behind commerce. Qualities of land, capital, labor, and relations relevant to them.	abstract general novel discretionary proscriptive
F. Exchange (1933–)	Qualities of relationships. Open-ended.	abstract universal novel discretionary prescriptive
G. Markets (1934–)	Structures of relationships. Open-ended.	abstract universal novel discretionary categoric
H. System (1946–)	The environment of conduct.	concrete universal traditional redistributive categoric

* Dates given may often disregard some antecedent, but these are provided only to suggest when a particular phase seems to have begun in earnest.

† The major innovation of each phase is underlined.

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pecially from 1914 onward (beginning with D on the diagram), the perspective clearly changes toward the abstract, culminating in the embrace of the whole system of which any particular conduct is deemed to be a part. What is not indicated on the diagram and was not fully appreciated at the time of its construction (and, therefore, not introduced among the characteristics) was the increasing involvement of science and technology in the regulatory policy process. As the concept of regulation began to embrace "the system," science moved from analysis of particular causal connections between conduct and injury toward "systems analysis." The embrace of science and technology helps further to explain why regulation has grown more vast in scope with each passing decade. Science and technology became increasingly important in order to develop the necessary analytic approaches, the methods, the concepts, and the vast data bases that were required for advocacy as well as implementation. Science was also drawn in to help develop the myths both to legitimize the vast programs and to overcome dissent with regard to them. How so? Because there is rarely such a thing as an actual system. It is an artifact of a general theory and a very large intellectual and ethical leap from sensory experience toward theory.

Thus the transformation from private to public responsibility, and from blame ethics to no-fault ethics, is as much alive in the regulatory laws as in the welfare laws. Regulatory policies adopted in the earlier epoch went after conduct on the assumption that its control would contribute incrementally to a better public order. Regulatory policies of the epoch of the 1970s ordain the result rather than concerning themselves very much with the conduct itself. These policies authorize administrators to bring about the results by whatever rules or standards of conduct may by them be deemed relevant to the broadly defined outcomes. Compare the Wagner Act to the Occupational Safety and Health Administration (OSHA) or the Environmental Protection Agency (EPA). The Wagner Act began with recognition of the need for industrial peace but proceeded to identify a fairly concrete list of employer actions that would constitute unfair labor practices. (The same is true of the Taft-Hartley Act of 1947.) In contrast, note the language of the 1970s labor regulatory law, OSHA: "To assure so far as is possible every working man and woman in the nation safe and healthful working conditions and to preserve human resources" (Sec. 2B). But probably the limiting case of system thinking is in environmental policy. When President Nixon set up the EPA, his message to Congress stressed that the purpose of the reorganization was to respond to the "system in its entirety." He went on to argue that "we need to know more about the *total environment*" if we are effectively to "ensure the protection, development, and enhancement of the total environment. . . ."

The New Ethic and the Logic of the Welfare State

Welfare State: The Ethical Equivalent of a State?

All the fossils seem to build in the same direction, toward the same kind of animal. As Diagram 1 suggests, the general outline of the patterns seems to run

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from autonomy to interdepedence, from absolutes to relativity, from concreteness to abstraction, from discrete units to continua, from asymmetry to reciprocity, from liability to probability, from simple causation to "vortex causation" and thence to systems. The many striking parallels of substance and of timing in Diagram 1 suggest that the changes are part of a progression of American values regarding the allocation of responsibility toward a larger consensus, *moving toward a welfare state public philosophy before there was a welfare state.*

All of this makes easier an appreciation of why the welfare state seemed so unrevolutionary by the time it was enacted into law beginning in 1935. All the logical steps to this point indicate a decline, if not an end, of personal responsibility. Vice and corruption are no longer seen as the causes of poverty but rather its results. Poverty itself becomes the evil. Dependency no longer requires research into the question of whether the dependent person is deserving or undeserving; dependency requires only a calculation as to the relative cost of neglect versus indemnification, rehabilitation, and maintenance. In other words, as the new social ethic spread toward an assertion of responsibility for all injuries and dependencies—an assertion made explicit in the Employment Act of 1946—the social system loop was closed. All injuries and dependencies became part of the social system, and all costs related thereto became *social costs.* This concept of social costs is one of the most interesting concepts in modern social thought and has not been adequately explored. Nevertheless, it is sufficient to say here that its earliest uses date from the 1920s with A. C. Pigou, or perhaps from J. A. Hobson, who in 1914 used the concept of "human costs." Pigou in particular was coining the term in order to capture some notions of cost that do not enter into the profit and loss statement of the firm.[27]

At such a point, personal responsibility can be replaced by public responsibility. Balancing between individual plaintiffs and defendants was never a stable solution. By converting injury into cost, and thereby socializing it, the opportunity arises where *both* parties can be spared: injuries can be permitted to happen and the owner/employer can be spared by *indemnifying the victim.* The cost is spread to the whole society, and the injuries can be combined in a universe large enough to deal with it statistically (collectively, publicly). This also means that we no longer merely assume a system; *we actually create one.*

The bottom line of Diagram 1—no-fault—anticipates an outcome not yet fully realized. But at least this much of relevance to the present inquiry can be asserted: the most widely shared social ethic—the modern position toward how to allocate responsibility for injury and dependency—has relegated private responsibility to a minor role. This means that individuals are permitted to escape personal responsibility or to provide for it by paying annual premiums through taxes or contributions.

Here again we see the major ethical corner we have turned. It was not an illogical turn, only an unpredicted extension of the logic of "*homo economicus.*"

[27] *Encyclopedia of the Social Sciences,* (1931), 473–75.

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Note a 1924 assertion that "the most important new development in economic thought will be the recognition of the economic value of human life. . . ."[28] The secularization of immortality was well established early in the century. Opposition to insurance had collapsed and along with it the earlier consensus supporting the immorality of measuring life or death or dependency by money. The economic view of human life, which was part and parcel of the nineteenth-century individualistic ethic, was simply extended to include the capital value of indemnifying injury, the capital value of maintenance, the monetary cost of rehabilitation versus prevention, and the cost of dependency or death in terms of lost income. Once these issues could be redefined away from questions of individual morality to questions of cost, it was a relatively easy logical step toward redefining responsibility itself, away from individual moral obligation toward probability (or, as we like to say today, risk). Since the ability to displace private responsibility and risk is economically, and therefore unequally, distributed, government is inevitably drawn in to introduce equity. Thus, public responsibility comes easily to mean governmental responsibility. Since a large part of it remains in the private sector, the public/private distinction has become blurred. But for the private or public sector, risk has been socialized, responsibility has become public: the ethical basis of the welfare state was, therefore, fairly clearly established before 1935. The depression only confirmed what had already become established: the business cycle had become part of a germ theory of economic disease. Thus was America building its ethical equivalent of a European state.

Pathways to Reform

If this and continued research in ethical history is at all successful, it will shed some new light on the welfare state and at the same time will shift the terms of discourse to a level that can yield meaningful reforms at substantive and constitutional, rather than at technical and fiscal levels. Moreover, it may open up a way for friends, rather than enemies, of the welfare state to lead the reform. At least three pathways to reform can already be perceived. Others, I hope and trust, will be opened up in the course of this argument and of further research and writing.

The welfare state as a state: Having established that the welfare state is as close to a national state as the United States has come, it is necessary to recognize that it has inherent contradictions, as do all states. Indeed, there should be no controversy over the still broader generalization that every system of beliefs and of institutions is built on contradictions. Probably the most important contradiction in the welfare state arises out of the American preference for a state built on *rights*. Although it was not until the 1960s that reference was seriously made to "welfare rights," the fact is that the American welfare state was built on rights

[28] Viviana A. Rotman Zelizer, *Morals and Markets: The Development of Life Insurance in the U.S.* (New York: Columbia University Press, 1979), 63.

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from the start. One of the major arguments in favor of insurance principles and the contributory obligation was that people would have access to welfare as a matter of right, rather than having to plead for it as a privilege. However, welfare introduced a profound tension in the American context, because the American concept of rights had been political and procedural, while the welfare state embodies a notion of rights that is essentially *substantive*—that is, the idea of a *right to* a certain remedy rather than a right to a certain process or procedure. A *right to* involves a claim, direct or indirect, on the resources of other individuals.

If an American welfare state is to remain a legitimate part of the American constitutional system, a concordance of some sort is going to have to be made between procedural and substantive rights. The first step is to recognize that they are contradictory. The second step is to figure out a way whereby they can coexist. The only way I can conceive of doing this is to reintroduce part of the older liberal ethic by defining substantive rights procedurally. Thus, as a step toward reform, I propose the following set of definitions as a continuum of considerations for purposes of guiding welfare reform:

> A *right* will be defined as a claim to a remedy that cannot be denied except by an extraordinary decision-making process, such as a constitutional amendment, a Supreme Court ruling, a special referendum, etc.
>
> An *entitlement* becomes a claim to a remedy that cannot be denied except by an ordinary decision-making process, but one that is specified and formalized in advance. Entitlement is a lower level of right, deniable by a lower level of decision-making process, such as a legislative majority, a joint resolution, perhaps a formal administrative rule arrived at by public hearing, etc.
>
> At the far end of the continuum is a *privilege*, which is also a claim, but one that can be denied at the discretion of the holder of the remedies or resources. Examples, of course, include an administrative agency or legislative committee to which Congress has delegated authority to decide who gets the money or the services.

Proposing to build a welfare state strictly on rights and entitlements may sound like a distinction without any difference from that which now exists. But nothing can be further from the truth. Present welfare-state practices turn out to be trying to have it both ways—by permitting claims to be established by normal interest-group process and then, after the fact, as an effective political strategy, to declare those claims rights. It is a normal part of the political process to protect one's successes by calling them rights, because that automatically sets them above ordinary majoritarian or interest-group processes. This tactic is also used by welfare bureaucrats, who find the vocabulary of rights an effective defense of their own agencies and their own budgets. But if we take the concept of rights and entitlements seriously, according to the definitions given above, a very strict limitation or ceiling can be imposed upon the interest group/bureaucratic defense process. It means that any claim worthy of being called a right or entitlement must have been established by a formalized process well in

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advance of the dispensation. It means that no other claims to benefits or services can be honored except by fairly explicit and formalized "legal reasoning" showing that the specific claim fits logically and squarely within the right or entitlement provided in advance. It also means that denial of the claim must be not only according to a decision-making process specified in advance, but that the denial be for reasons that are not unreasonable or constitutionally offensive. This approach is reinforced by the third proposal below, involving rule of law, but they are not identical. The distinction between rights, entitlements, and privileges as proposed here would clarify the political discourse to such an extent that people would be more aware of the cynical or self-interested use of the rhetoric of rights, but at the same time they would educate truly needy people about their opportunities to use that same language in their own defense. The mere clarification of the language of welfare is in itself a step toward restoration of the strength and legitimacy of the welfare state.[29]

The Welfare State, Liberalism, and Self-Restraint: There is another contradiction inherent in the American welfare state for which recognition is in itself in the nature of a reform. This is the contradiction arising out of liberalism, since the welfare state is, or is part of, a liberal state. Liberalism embraces the problem of the pluralism of moral codes by concerning itself only with conduct deemed *harmful in its consequences.* Liberalism tries its best to take no position on the morality of conduct. This is why the ethical revolution documented above can be called a liberal revolution, relieving conduct to the maximum extent from moral implications. I personally embrace this liberalism as the most reasonable approach to government in a pluralistic society. However, I recognize at the same time that this has produced grievous instability, because liberals fail to recognize that *under some conditions, any and all conduct can produce harmful consequences.* This means that liberalism has a tendency, unless self-consciously restrained, to spread toward the entire society and all conducts of all individuals. In fact, given the new welfare ethics, liberal government has already become obliged to respond to any and every argument putting forward a case that a connection can be established between a particular conduct and some injurious consequence. This is why modern liberal government became a gigantic magnet of open-ended commitments without priorities. Interest groups have had a lot to do with the expansion of the liberal state. But "the state" itself has become an interest with its own inherent tendency to expand. This new dimension is not at all incompatible with interest-group politics, but the expansion of the welfare state is not explicable in interest-group terms alone. There is an inherent yeasty quality to unregulated liberalism. Once the new social ethic removed blame and replaced it with socialized responsibility, everyone with any capacity had an incentive to compete over the allocation of cost. And everything became good to

[29] Distinctions consonant with the ones made here, although made for a different purpose, will be found in John Hart Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980), 136–145 and fn. 35

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do, because all injuries and dependencies, regardless of source or cause, became "social costs." Thus, a dollar spent on safety or clean air today may save ten dollars in crime control or rehabilitation twenty years down the line. This goes far to explain the extraordinary burst of policies expanding the welfare state and the regulatory state between 1965 and 1975.

To this tendency of unreflective liberalism should be added the mentality of the insurer: insurance is probably the only industry in existence in which the provider of the service is more concerned with the welfare of the consumers than the consumers themselves. Insurers and indemnifiers are chasing their tails, by indemnifying all injuries and dependencies and then by trying to regulate all conduct in order to cut down on the incidence of injuries to be indemnified. There is no solution, technically speaking, to this kind of spiraling outcome of the contradiction inherent in liberalism. The solution comes in making leaders aware of the contradiction and its peril. Recognition of the contradiction would not undermine liberalism but would strengthen it, if awareness leads to the search for self-restraining devices.

The Welfare State and the Rule of Law: During the first decade of the American welfare state, there were enough ambivalencies about it to try to find some automatic balancing mechanisms. The preference for automatic mechanisms runs deep in the American political character. It produced the separation of powers in the Constitution. It explains the American embrace of market competition. It also explains the post-Roosevelt embrace of "automatic stabilizers" in fiscal and monetary policy.

This same spirit was expressed in 1972, when Congress adopted indexing of social security benefits in order to minimize the discretionary aspects of the welfare state. The urge to make welfare expenditures self-regulating was a very good one, but the choice of mechanism turned out to be very poor: pegging welfare benefits to the cost of living. It meant that as long as there was inflation, welfare benefits would spiral upwards, with the welfare increases themselves contributing to the inflationary spiral. This achieved the absolute reverse of the whole point of indexing, which is to establish a criterion completely independent of and contrary to an existing tendency, such that the two can work to counterbalance each other. If indexing is to work as an automatic self-regulating force in the welfare state, the index will have to be pegged to something a great deal more independent of the system itself than the cost of living. One possibility worthy of consideration is productivity. By this I do not mean individual productivity but *cohort productivity*—that is to say, measuring the productivity of each age group and perhaps even each occupational family and tying the overall benefit structure to that. There has been a great deal of talk these past few years about "comparable worth." I personally believe that such a concept can be operationalized. It has already been done in the overall system of job classification, as, for example, in the government service (GS) occupational ratings of the federal government. This kind of job classification takes many years, but it is not impossible to accomplish, whereby conventions of analysis produce consensus about jobs which may to a lay person appear to be unlike but to experts through debate

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can be classified as comparable and, therefore, put within the same "occupational family." Now, those who are pushing for "comparable worth" today have in mind its use as a means of upgrading the pay scales of certain jobs. That would certainly be a benefit of a successful job classification. But at the same time, one public policy gained from a successful comparable worth classification would be to use those categories as ceilings—as criteria for welfare-benefits indexing independent of claims and costs of living.

But whatever strength there may be in such an indexing policy, no self-regulating mechanism will work as well as *rule of law.* In fact, one of the problems with indexing is that it is a "doomsday" approach, whereby the legislature agrees to make one single policy that will put an end to all future policy making in the area in question. The point of indexing is to take away the human element and, therefore, to take away the majoritarian process of policy making in an elective assembly. That should not argue totally against indexing as a self-regulating mechanism, but it should certainly be an argument against total reliance upon it.

The advantage of rule of law in this context is that it can serve as a self-regulating mechanism, but one that must be constantly attended to by the democratic decision-making process. The point of rule of law is to make an unmistakably clear statement of policy at the outset and to provide clear and relatively severe guidelines to delimit the range of discretion available to administrators whose responsibility it is to implement the program.

Thus, the only way to make the earlier approach to rights and entitlements work well at all is to define in clear rules of law who has the right or the entitlement to what. This not only puts a severe check on the discretion of the administrator. It gives each individual citizen a much clearer standard by which to measure the performance of administrators and, perhaps more importantly, to measure the benefits of one set of beneficiaries against another. This open and explicit measuring process will contribute mightily to constant pressure on decision makers to clarify, amend, and further clarify the rules of law guiding each welfare category.

Welfare categories defined more clearly by rules of law can be unrealistically generous just as they can be severely and punitively narrow. But either way, that is a decision that can and should be made by each successive generation of decision makers and not by administrators who are caught in the web of immediate community demands. There will always be certain individuals in any community who have an emergency need that must be met immediately or irreparable damage will ensue. But these are hard cases that make bad law. One should not open up welfare categories to discretion in order to meet the hard cases. Those can be met by an extraordinary means, also provided by law: "second-order rules" specifying the conditions under which administrators can step outside the clear rule of law categories. The point here is that if a liberal welfare state is to survive, it cannot do so without a clear, highly stabilized, and self-restrictive set of benefit categories, whether these are generous or severe. Discretionary categories are self-defeating, because discretionary services to one or more persons become the leveraging point for the same services elsewhere in a system where en-

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titlement comes to be defined merely as "what I have coming to me whenever other persons I judge to be like me have gotten something." Since services already dispensed cannot be taken back, the only way entitlements thus defined can be satisfied is by yielding to the other claims. The only mechanism by which that can be avoided is clarification of the original basis of claims.

Another advantage of restricting all welfare, generously or severely, to the principle of strict and clear rules of law is its service as an antidote to bureaucratic power. Opening welfare categories to discretion opens opportunities for administrative agencies to build supportive constituencies. The more discretionary any policy category, the more the resources back of that policy can be used as patronage. Max Weber is understood to have believed that the secret to bureaucratic power is information. Nonsense. The secret to bureaucratic power is discretionary resources, resources that can be used to build supportive constituencies—whether they build a military-industrial complex or a welfare agency-welfare client complex.

In an earlier work, I distinguished between Old Welfare and New Welfare on the basis of nondiscretionary versus discretionary categories.[30] This present effort to initiate a history of welfare ethics is beginning to reinforce the argument that discretionary categories are virtually the end of the welfare state.

EPILOGUE

Recognition of the various contradictions inherent in the welfare state need not produce a rejection of the welfare state. To reject the welfare state would simply involve embracing some other system of allocating responsibility for injury and dependency whose contradictions would exist but would take a while to be discovered. Since we can already identify the contradictions in our own familiar welfare state, we ought to go on and do so in order to learn how to cope with them. Contradictions inherent in an institution are not problems that can be solved in the sense that a puzzle has a solution. They can only be coped with, and that should be the essence of political discourse.

I write in confidence that any obituary for the welfare state is premature. My greatest concern is that the crisis will be turned over to the enemies of the welfare state and that they might be able to stage a successful counterrevolution. Already there are signs of this, even among formerly liberal intellectuals. The signs include efforts to place statutory limits on insurance coverage. Efforts include turning maximum welfare responsibility back to those local and county units that are historically the most selfish, the most discretionary, and the most moralistic in the business of allocating responsibility for injury and dependency. This counterrevolution will be successful unless new reform ideas come from the friends and supporters rather than the enemies of the welfare state. But their reforms will have to be fundamental, based upon a fundamental analysis with a fundamental critique. Technical tinkering will no longer suffice.

[30] Theodore J. Lowi, *The End of Liberalism*, 2nd ed. (New York: Norton, 1979), chap. 8.

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The Gender Basis of American Social Policy

VIRGINIA SAPIRO

During the last quarter of the nineteenth century, women—thousands of them—became increasingly organized and active in the attempt to promote the general welfare, especially by helping the most vulnerable members of society. As individual leaders and as group participants they were instrumental in organizing and nationalizing movements for public health (mental and physical), poor relief, penal and other institutional reform, education for the previously uneducated, and child welfare. As the nineteenth century waned and the twentieth dawned, women were prominent among proponents of a principle which was hitherto nearly alien to American ideology but which has now, a century later, come to be an accepted part of our political views: the government and, they increasingly argued, the national government, have a responsibility to promote the general welfare actively by providing initiative and support where necessary. The degree and types of support remain, perhaps more now than then, matters of profound political contention, but in the late twentieth century even the most conservative ideologues tend to agree that government must provide a "safety net" for its people.

The late nineteenth and early twentieth centuries was also a time during which thousands of women, many of them the same as those involved in the general welfare movements, were agitating to promote women's welfare specifically.[1] The

[1] On women's movements of this period see Barbara Berg, *The Remembered Gate: Origins of American Feminism: Women and the City, 1800–60* (New York: Oxford University Press, 1978); Ellen DuBois, *Feminism and Suffrage: The Emergence of An Independent Women's Movement in America, 1848–69* (Ithaca, N.Y.: Cornell University Press, 1978); Eleanor Flexner, *Century of*

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suffrage movement, aimed at providing women with what we now regard as the basic right of citizenship and the basic means of leverage within a democratic political system, is only the best known facet of the women's movement of that era. As many historians have demonstrated, a large proportion of nineteenth-century feminists came to their concerns for women through their charitable and political efforts aimed at the needy.[2] Moreover, many nineteenth-century feminists conceived of their woman-directed activities as means to improve the lot not just of women but of women's families and communities.[3]

The development of American social welfare policy was heavily influenced by women, who often saw themselves acting on behalf of women. These women—many of them feminists—were instrumental in the development of the American social welfare state, such as it is: the efforts in the 1840s of Dorothea Dix to get Congress to provide money and land for the construction of mental institutions (the bill passed but President Franklin Pierce's veto was sustained); the establishment of the U.S. Sanitary Commission; Josephine Shaw Lowell's New York Charity Organization Society and its counterparts; the settlement movement; Josephine Kelley's National Consumers League; many Progressive leaders; the instigators of the Children's Bureau; and the authors and primary promoters of the 1921 Infancy and Maternity (Sheppard-Towner) Bill.

The history of movements for women's welfare and for the general welfare are virtually inseparable. But we can go further and argue that it is not possible to understand the underlying principles, structure, and effects of our social welfare system and policies without understanding their relationship to gender roles and gender ideology. Three examples suggest how important understanding this relationship is: widows' or mothers' pensions, protective labor legislation, and the Sheppard-Towner Act of 1921.

In 1911, Missouri became the first state to provide for cash assistance to widows with dependent children. By 1935, the date of the nationalization of this policy through Title IV (Aid to Dependent Children) of the Social Security Act, all states except South Carolina and Georgia had acted similarly. As Walter Trattner argues, "Widow's pension laws marked a definite turning point in the welfare policies of many states. In theory at least, they removed the stigma of charity for a large number of welfare recipients. They also broke down the nineteenth-century tradition against public home relief."[4] Before the advent of widows' pensions, public pensions were limited to military personnel or civil servants, people whose willingness to work for limited public salaries would be re-

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Struggle: The Women's Rights Movement in the United States (Cambridge, Mass.: Harvard University Press, 1975); and Stanley Lemons, *The Woman Citizen: Social Feminism in the 1920's* (Urbana: University of Illinois Press, 1972).

[2] For example, Berg, *Remembered Gate*; and DuBois, *Feminism and Suffrage*.

[3] For example, Linda Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (New York: Viking Press, 1977).

[4] Walter I. Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America* (New York: Free Press, 1974), 190.

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warded with security.[5] Widows' pensions were different in that they provided for needy private persons. The Social Security Act, through Aid to Dependent Children (ADC), did the same at the federal level.

Protective labor legislation offers another example of the role that gender differentiation played in promoting social welfare ideas within the United States. At the turn of the century, efforts to provide for public regulation of working conditions advocated by both trade unions and groups such as the National Consumers' League were turned back consistently on the grounds that they would conflict with the right of employers and employees to make contracts freely and unimpeded by forces outside the market. The major turning point in employment and workplace policy came in 1908 when the Supreme Court, in *Muller v. Oregon*, upheld the right of a state to limit the working hours of women.[6] Although protective labor legislation has been highly contentious among feminists from the first for reasons that will be discussed below, the "thin edge of the wedge" for regulation of the workplace was provided by policies based on a particular construction of gender ideology.

A third example of the importance of gender in the expansion of American social policy is the Sheppard-Towner Bill, enacted in 1921 and in force until Herbert Hoover assured its demise in 1929. Sheppard-Towner provided for the first time for matching federal grants-in-aid to states for the purpose of promoting child and maternal health services. This was the first time the federal government provided grants for state welfare programs other than education,[7] and it provided the precedent for later efforts. The program was widely attacked as the first incursion of "bolshevism" into the United States and was the subject of the first major—but certainly not the last—campaign against "state medicine."[8] Anxiety over socialism was one of the major reasons for the demise of the pure laissez faire system of labor contract in the marketplace. Sheppard-Towner put government, notably the federal government, in the business of providing the public with social services other than protective services and education.

These cases mark turning points in American political ideology. The notion that "that government governs best that governs least" was transformed, at least to the degree that the standard of what constitutes "least" was questioned. To the belief that people should be self-reliant, which meant providing for themselves and their families, was added the idea that it was good for private individuals to engage in charitable acts (although it was not good for individuals to expect to depend upon these acts), and also that government had some responsibility to provide. Government was now to promote the general welfare not just by assuring civil order, but by providing for that welfare directly.

Of crucial importance here, women were the apparent beneficiaries of these

[5] James Leiby, *A History of Social Welfare and Social Work in the United States* (New York: Columbia University Press, 1978), 212.

[6] *Muller v. Oregon*, 208 U.S. 412, (1908).

[7] Trattner, *From Poor Law to Welfare State*, 187.

[8] Lemons, *Woman Citizen*.

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policies. When these policies were first set in place, there was no intention on the part of most policy makers to set any precedents for other parallel reforms or, certainly, for more widespread changes in the structure or theoretical basis of political economy. Indeed, there was considerable opposition to these changes, specifically because they might turn out to be turning points and precedents, as some interest groups such as the labor and the Progressive movements hoped they might be. Why were women so central to these changes? What does this "coincidence" tell us about the development of gender ideology, political ideology, and social policy in the United States?

Unfortunately, the standard treatments of social policy offer little assistance in answering these questons because the relationships among gender, feminism, and the development of social welfare policy has generally been neglected outside of feminist scholarship. Marxists and non-Marxists alike have identified the development of the welfare state as a part of the political process of the development of capitalist industrialism; to the non-Marxist especially it is a part of the political transformation of societies into mass democracies. Within the standard view of the history of welfare states, as Peter Flora and Arnold J. Heidenheimer write, "one may interpret the welfare state as an answer to increasing demands for socioeconomic equality or as the institutionalization of social rights relative to the development of civil and political rights."[9] Just so; but academic analyses tend to focus on demands and rights specifically relevant to class conflicts within society, thus obscuring the roles of women and gender. This, interestingly, is the case as much for non-Marxists as for Marxists. A woman's economic interests are generally assumed to follow from a husband when the woman is married, and especially a homemaker, and to be defined adequately by standard class definitions in cases where women are employed. The problem is that standard views of economic interest and organization are defined primarily through male history and experience, and feminist activists have often been aware of these differences.[10]

Analysis of the theory and practice of social policy has rarely taken full account of the relevance of gender, and often implicitly accepts without examination certain paternalistic and patriarchal assumptions about the nature of gender that are also embedded in the policies themselves. As a result, there is little understanding of how social policy affects women in particular and, more generally, how women's welfare is linked to general welfare.

The remainder of this article examines the relationship between women's welfare and the general welfare within the framework of American social policy, especially as it treats economic dependency. Women have been defined primarily

[9] Peter Flora and Arnold J. Heidenheimer, "The Historical Core and Changing Boundaries of the Welfare State," in Flora and Heidenheimer, eds., *The Development of Welfare States in Europe and America* (New Brunswick, N.J.: Transaction Books, 1981), 22.

[10] For further discussion see Christine Delphy, *Closer to Home: A Materialist Analysis of Women's Oppression* (Amherst: University of Massachusetts Press, 1984); and Lydia Sargent, ed., *Women and Revolution: A Discussion of the Unhappy Marriage of Marxism and Feminism* (Boston: South End Press, 1981).

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as dependents, *because* others depend upon their dependency. American social policy, it shall be argued, not only assumes, but helps to maintain this state of affairs. Further, many social policies that most affect women are not, in fact, aimed primarily *at* them but rather, in many senses, *through* them. Finally, analysis of the relationship between women and social policy does not teach us "only" about women and social policy, but about our construction and understanding of social policy and the general welfare more broadly.

American Social Policy: The Standard Version

Social policy is, as Albert Weale has written, "a deliberate attempt by governments to promote individual and social welfare in certain specific dimensions using any suitable policy instruments."[11] This definition is useful because it underscores the point that social policy is not a matter simply of social services or even more narrowly (and perhaps more commonly believed) social services for the poor. Social policy, in other words, is not always what it seems to be to the untrained eye. Some of the most important social services are not aimed at the poor (for example, public universities), and many of the social policies that might do the most to promote individual and social welfare are not services (for example, occupational safety and health regulations or benefits policies and nondiscrimination policies). Indeed it has been argued repeatedly that it is not easy and not always worthwhile to draw definite boundaries among social policy and fiscal or civil rights policies.[12]

For the first century and more of American history, social policy basically rested on the belief that the welfare of the society and its component parts could best be assured by allowing—encouraging—individuals to pursue their own interests freely. This notion was as much a moral as an economic belief. What came to be known as the "protestant work ethic" supported moral and policy distinctions made among the "just" desserts earned by the diligent well-off and the shiftless poor and the unfortunate "deserving" poor. As Robert Goodin has pointed out, the emphasis on self-reliance was, at its heart, a concern about the moral character of individuals.[13] Conservatives continue to maintain, despite empirical evidence to the contrary,[14] that provision of welfare benefits makes individuals psychologically dependent and removes their motivation to pursue their interests in the marketplace and, therefore, short circuits the entire system. In other words, provision of welfare changes the character of individuals so as to make them bad and unproductive members of society.

[11] Albert Weale, *Political Theory and Social Policy* (London: Macmillan, 1983), 5.

[12] Weale, *Political Theory and Social Policy*; Richard M. Titmuss, "The Social Division of Welfare: Some Reflections on the Search for Equity," in Titmuss, ed., *Essays on the Welfare State* (London: Allen and Unwin, 1958), 34–55.

[13] Robert E. Goodin, "Self-Reliance versus The Welfare State," *Journal of Social Policy* 14 (January 1985): 25–47.

[14] Ibid.

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In practical terms, therefore, the nation was to be composed of diligent hard-working individuals who competed in the marketplace (or, for the agrarian ideal of self-sufficiency, worked their land) to make something of themselves and to provide for themselves. With the growth of industrialism and the ascendency of a middle class, the principle of individualistic competition in a free market to assure self-sufficiency became a moral, social, political, and economic ideal. The implications of this set of beliefs for social welfare have been well summarized by Ramesh Mishra: "Paternalism—of the state but also of the employer—is frowned upon."

> Not the bonds of status but those of contract between "free" men typifies the basic model of social relationship outside the family. Translating these generalities into patterns of welfare, we might say that the middle-class society is likely to develop a "residual" system of welfare. In the early states of industrialization neither state nor enterprise welfare is favored. Instead, friendly societies, voluntary organizations, charities, and market responses to the various problems and needs are encouraged.[15]

This is precisely what happened during the second half of the nineteenth century in the United States. There was an impressive growth of charity and social action (a growth especially among women) as the more negative by-products of industrialism became more obvious, but this "social action was largely a voluntary do-it-yourself arrangement among individuals with a common interest."[16]

Should individuals be in need of assistance or cooperation, such arrangements were to be made on a voluntary basis. There were clear hierarchies of responsibility or, as Michael Walzer puts it, spheres of justice.[17] The core in which assistance could be freely sought and in which others had the most responsibility to provide was the immediate family followed by more distant relatives. At the next stage were neighbors and others in the local community. As the public domain began to share in provision, the state was seen as more obliged than the federal govenment. Above all, aid and cooperation were to come from the private world rather than from government. As James Leiby notes, only in the twentieth century was "social welfare" rather than "charity and correction" widely used to label assistance. "Social welfare," he argues, connotes "a recognition of human interdependence. . . , a sense of mutual responsibilities and goals among [society's] classes and parts, and of the need for common policies to realize them."[18]

The earliest social policies fall into two general categories. The first, into which we might put social insurance (originally called "workingman's insurance") and pensions, were aimed at helping or providing some added security to those who were working to help themselves and their society. The second was assistance aimed at those who seemed most inevitably dependent: paupers

[15] Ramesh Mishra, *Society and Social Policy: Theories and Practice of Welfare* (London: Macmillan, 1981), 41.

[16] Leiby, *A History of Social Welfare*, 33.

[17] Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

[18] Leiby, *A History of Social Welfare*, 2. For a parallel discussion of charity versus justice, see Robert E. Goodin, *Protecting the Vulnerable* (Chicago: University of Chicago Press, 1985), chap. 2.

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without relatives to help, children and especially orphans, and "defectives" such as the insane and criminally inclined. Later a third type of social policy developed, but did not really flower until the post-World War II era: social regulation or government intervention in the rules and procedures of the market. Above all, American social policy was developed with a continuing distaste for paternalism and an emphasis on allowing individuals, and by later policies helping individuals, compete as individuals in an open market in order to achieve self-sufficiency and self-reliance.

The previous paragraphs offer little more than a standard, albeit boiled down, rendition of American social policy thinking and practice. Turning our attention to the place of women in this story we find that this rendition is seriously flawed. It is written in apparently generic gender-neutral terms and, therefore, masks an extremely gender-based story.

The Revised Version: Beyond Gender Neutrality

In order to see the fault in analysis of social policy and in social policy itself, let us look again at the main themes: dependence and self-reliance, individualism and paternalism. In fact, if we consider the subjects of policy not in the apparently gender-neutral terms (such as individual, worker, family) usually used, but in the explicit terms of male and female, we find that the dominant ideology underlying social-policy thinking and action has never stressed individualism pure and simple. It has never been uniformly opposed to either dependency or paternalism, and it has never supported a universal value of self-reliance, especially in economic terms. Instead, it has supported individualism, independence, and self-reliance for some people (primarily men) and dependence and reliance on paternalism for others (primarily women). This is largely because individuals have been viewed in terms of functional roles depending upon gender. Men are regarded as breadwinners for themselves and their families, and women are regarded as wives and mothers who are and should be economically dependent upon those breadwinners.

In order to understand the relationship of women to social policy, it is necessary to consider policy directly regarding the ability of women to provide for themselves. As we have seen, the primary purpose of most American social policy is supposed to be to allow "individuals" to provide for themselves, to reward those who have done so, and to provide a back-up for those who have not been able to do so because of circumstances beyond their own control. If, however, this really was "the" American approach to social policy, it should apply in a gender-neutral way. In fact, this view did not apply to women; indeed, throughout most of American history it has been contradictory to the predominant prescription for women.

Until the enactment of the Married Women's Property Acts in the 1840s, women could not own property including that which they inherited or earned through their own labor, and they could not make contacts without their hus-

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band's consent. In other words, women were barred by law from engaging in the activities that were supposed to be the primary principle of political economy and the civil right most fiercely protected by American law up to the twentieth century—the right to contract freely to pursue one's economic interest. The reason was the common law principle of *femme couverte*. Women's economic and political identities and interests were incorporated into (not with) those of their husbands. Women's only voluntary contract was the marriage contract, by which they were thought to be giving blanket tacit consent to most future decisions made by their husbands.[19]

Even when free women gained the right to own and manage property and to make contracts, they did not gain the right to provide for themselves. If employers wanted to bar women as a class from employment, their right to do so was protected by the principle of governmental noninterference in private contracts. Moreover, as women began to seek training and jobs outside the women's sphere of employment (domestic labor and sewing) states stepped in to help bar women's further progress.

The first Supreme Court case concerning women's economic rights was *Bradwell v. Illinois*, which in 1874 upheld a state's right to prohibit women's admission to the bar.[20] Although the main reason offered by the Court was the principle of state's rights, the concurring opinion expressed the paternalistic view that has been repeated in law and political argument numerous times. "Man is, or should be, woman's protector and defender," and, therefore, must protect her from the world of work and individualistic competition. Further, "the harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband." Most telling of all, the prohibition covered not just married but all women, because women are defined by their actual or potential statuses as wives and mothers. "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of society must be adapted to the general constitution of things and cannot be based upon exceptional cases." Whereas the Protestant work ethic as applied to income-producing work was a moral and economic principle for men, economic dependency was a moral, God-given principle for women.

Government became increasingly involved in restricting women's ability to provide for themselves and their families and even, in denying women their own rights of citizenship separate from those of their husbands.[21] Public institutions of higher education, including the land grant colleges, were generally sex segregated and, therefore, kept women from the programs that might lead them

[19] Carole Pateman, "Women and Consent," *Political Theory* 8 (May 1980): 149–68; and Virginia Sapiro, "Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States," *Politics and Society* 13 (1984).

[20] *Bradwell v. Illinois*, 83 U.S. 130, (1874).

[21] Sapiro, "Women, Citizenship, and Nationality."

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to professional careers. Women were barred from certain job classifications and in some jobs such as teaching, they were refused employment if they were married or certainly, if they were pregnant. Female employees were fired if they got married or if they became pregnant. Government discriminated against women in pay. Even the National Industrial Recovery Act (NIRA) signed by Franklin Delano Roosevelt in 1933 provided for sex differences in pay despite intensive lobbying by women's groups and assurances by Eleanor Roosevelt and Labor Secretary Frances Perkins. Moreover, women's jobs were especially likely to be excluded from minimum wage regulations, and the Public Works Administration and Federal Emergency Relief Administration tended to emphasize projects that involved male jobs.[22]

Not until nearly a century after *Bradwell*, in Title VII of the 1964 Civil Rights Act, did the federal government take a stand against sex discrimination in hiring; only in 1971 did the Supreme Court, in *Phillips v. Martin Marietta*, argue that employers may not discriminate against women, in this case women with children.[23] Following a case in which the Supreme Court upheld the right of an employer to discriminate against pregnant women in occupational benefits,[24] Congress passed the 1978 Pregnancy Discrimination Act, which incorporated into Title VII the principle of nondiscrimination against pregnant women.

Because social policy tends to be analyzed as a class issue, we tend to look to labor movements and unions as some of the primary instigators of progressive social policy insofar as their role is to pursue the interests of workers. Although women have benefited from labor organization in gender specific ways (for example, gender differentials in pay are lower among unionized than non-unionized workers), the early history of the labor movement shows considerable support for paternalistic and exclusionary treatment of women in the job market.[25] Although women constituted about 30 percent of printers by 1831 and 16 percent of newspaper compositors by 1850, for example, print unions would not accept women to full membership until 1873.[26] Other unions continued to bar women. Samuel Gompers, among other union activitsts, was opposed to women workers on the grounds that they took wages from men and destroyed the family. In 1898 he urged the government to prohibit women from federal employment.

[22] Lois Scharf, " 'The Forgotten Woman': Working Women, the New Deal, and Women's Organizations," in Lois Scharf and Joan M. Jensen, eds., *Decades of Discontent: The Women's Movement, 1920–40* (Westport, Conn.: Greenwood Press, 1983), 243–60. On women in the New Deal see also Susan D. Becker, *The Origins of the Equal Rights Amendment: American Feminism Between the Wars* (Westport, Conn: Greenwood Press, 1981); and Susan Ware, *Beyond Suffrage: Women in the New Deal* (Cambridge, Mass.: Harvard University Press, 1981).

[23] *Phillips v. Martin Marietta*, 400 U.S. 542, (1971).

[24] *General Electric v. Gilbert*, 429 U.S. 125, (1976).

[25] Bettina Berch, *The Endless Day: The Political Economy of Women and Work* (New York: Harcourt, Brace, Jovanovich, 1982).

[26] Maron Marzolf, *Up From the Footnote: A History of Women Journalists* (New York: Hastings House, 1977); and DuBois, *Feminism and Suffrage*.

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The perspective of labor unions leads us back to specific consideration of social policy. The labor movement and its leaders such as Gompers were among the most committed supporters of protective labor legislation for women. Their reasons varied. Certainly some of the motivation was the desire to assist those in a relatively weak position in the labor market. As suggested earlier, unions saw woman-directed policies as the "thin edge of the wedge" of more widespread protections for all workers. But another major motivation in the U.S. as in other countries was to use legislation directed at women to protect male jobs and wages. Protective labor legislation for women could directly and indirectly keep women out of competition for "male" jobs and make them less desirable to employers. Indeed, "protection" has generally been applied less strenuously to "female" than to "male" jobs. Hours and weightlifting limits, for example, were never applied to domestic labor, paid or unpaid. Protective labor legislation made women more expensive to hire than they had been. As femininst observers have often remarked, this type of policy has served at least as much to keep women out of higher paying jobs as it has to improve their working conditions. This has been true of later types of protective legislation as well.[27]

Another early proposal of the labor and other movements concerned with workers was not just the provision of a *living* wage, but of a family wage; that is, a wage that would give the (male) breadwinner the ability to support his family without needing to depend on a wage-earning wife. Again, the thinking did not simply concern the economic situation of a family, but the character of those in the family. Women, it was thought, should not have to seek employment because their jobs were to care for the other members of the family. Men should not have to compete with women for jobs; after all, men need to support their families. Most important, "manhood" was defined in part by the ability of a man to support his family. Men were—and still to some degree are—taught to feel emasculated when they depend on women's wages. The goodness or badness of dependency depends on who is depending on whom. Husbands' economic dependence upon wives is bad. Wives' economic dependence upon husbands is good, in part because it is often thought to allow men to be more independent.[28]

Most social policy aimed at women has been designed explicitly to benefit them in their capacity as wives and mothers and more particularly, to benefit those who depend upon them for nurturance and domestic service: husbands, children, and elderly relatives. The widows' pensions and Sheppard-Towner Act mentioned above are early examples. In an important sense, women have not been the main targets of these policies but rather, they were the main conduit of these policies, which were aimed at providing for children. The original con-

[27] On occupational safety and health, for example, see Wendy Chavkin, ed., *Double Exposure: Women's Health Hazards on the Job and at Home* (New York: Monthly Review Press, 1984).

[28] For an economic history that treats the changing psychology of gender divisions of labor, see Julie A. Matthaei, *An Economic History of Women in America: Women's Work, The Sexual Division of Labor, and The Development of Capitalism* (New York: Schocken, 1982).

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struction of ADC provided for support of the children in one-parent families. Only later was support extended to the caregiver.[29]

Social policy aimed at women has been designed to benefit them in their capacity as wives and mothers only in a limited sense. Its intention has been to enable them to *care* for their families and not, by and large, to *provide* for them in the sense that is expected of a breadwinner. Often, as in the case of ADC (and its later incarnation as AFDC (Aid to Families with Dependent Children)), it has been aimed at relieving mothers of the "need to work." Women were expected to remain economically dependent because of domestic responsibilities assigned to them. In contrast, the "man in the house" provisions, which allowed administrators to withhold funds if any evidence was found to indicate a man (related or not) was living in, or even a frequent visitor to the house, underscores the degree to which men were still regarded as responsible for economic support.

Only in the late 1960s and especially the 1970s were any serious efforts made to enable women to be economic providers for themselves and their families. Title VII of the Civil Rights Act was given some force in 1971 when the Equal Employment Opportunities Commission (EEOC) gained power to litigate. The growth of affirmative action programs signaled governmental support for improving the employment prospects of women, even if no employers were actually punished for failing to achieve hiring goals. The Work Incentive (WIN) Program established at the end of the 1960s began to suggest that even for women, "work goes with welfare." At first, however, men were given priority in WIN funding, followed by women on a first-come-first-served basis.[30] In 1971, AFDC regulation required for the first time that female recipients of AFDC funds with children over six years old should seek employment.[31] Even the relatively meager efforts to provide women with the means and incentive to seek employment have remained controversial and, during the Reagan administration, have been attacked and reduced.[32]

Even if there is more widespread support for the breakdown of familial gender roles in the marketplace, support for traditional gender roles within the home remain firm even, in a sense, with regard to families in which there is no adult male. Programs of employment incentives and supports for women have not included provision of child care services, which remain the responsibility of mothers. A bill passed through Congress that would have provided federal funds for day care centers was vetoed by Richard Nixon on the grounds that such services would break up "the family." Despite the pro-nationalist claims of recent administrations, the United States remains one of the few Organization for Eco-

[29] Dorothy C. Miller, "AFDC: Mapping a Strategy for Tomorrow," *Social Service Review* 57 (December 1983): 599–613.

[30] Sar A. Levitan, Martin Rein, and David Marwick, *Work and Welfare Go Together* (Baltimore: Johns Hopkins Press, 1972), 77.

[31] Deborah K. Zinn and Rosemary C. Sarri, "Turning Back The Clock on Welfare," *Signs* 10 (Winter 1984): 355–70.

[32] Ibid.

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nomic Cooperation and Development (OECD) nations that lacks a maternity leave policy. It lags in other supports for pregnant women and families with children as well.

It is important to note that although women and children are supposed to depend upon a male breadwinner for financial support, public policy has not been vigorous in enforcing this goal. Marital law still assumes that husbands are responsible for financial support, but court cases continue to conclude that if a woman is actually residing with her husband that is proof enough that he is supporting her adequately regardless of what he provides or what he is capable of providing. This is an unwarranted assumption either that husbands provide adequate allowances to their wives or that married couples pool their resources in such a way as to allow each individual to draw on them freely. One of the major causes of poverty among women and children in recent decades has been the refusal of divorced husbands to comply with court orders for support payments. Only when the Reagan administration realized that considerable sums of AFDC money could be saved was a serious policy of enforcement initiated, but it was originally designed to encompass only women who were eligible for AFDC funding. The implication was that support of women by their husbands is a private matter of no concern to government unless or until women became public charges because of lack of spousal support. If for much of our history, women's welfare was supposedly safeguarded by a husband, we are led to the deduction that for most of our history, women's welfare has been of little concern to government, except insofar as it served instrumental purposes in providing care and services for others.

Women's primary relationship to the structure of the general welfare is to provide essential services that might otherwise cost money either to the private or public sector.[33] As many feminist observers have pointed out, when it is said that families have the primary responsibility to care for themselves, what one really means is that women have the primary responsibility to care for others in the family.[34] Given the continuing gender division of labor in the family, it is not the family as a unit but rather women in families who care for children, the elderly, and other dependents, including breadwinners who are dependent upon these services for their own day-to-day maintenance. Of course, given gender divisions of labor in the marketplace, when people are employed to replace what has previously been women's domestic labor, these services continue to be rendered by women. A major and generally hidden question in social policy, therefore, is whether women should be required to provide for the general welfare in a way that often necessitates that they remain economically dependent and ultimately perhaps in need of social welfare provisions themselves. Or can women and others provide for the general welfare in a way that allows women to provide for themselves as well?

[33] See, for example, Gerdt Sundström, "The Elderly, Women's Work, and Social Security Costs," *Acta Sociologica* 25 (1982): 21–38.

[34] Michele Barrett and Mary McIntosh, *The Antisocial Family* (London: Verso, 1982).

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Women's contribution to the general welfare goes beyond the provision of services that need to be done. Even in the minority of cases in which women do not contribute wages to a household, they help determine the worth of the wages that are contributed by others. Again, because of the continuing gender division of domestic labor, women's efforts in shopping, cooking, and other household tasks affect the value of each dollar brought in. Although public pronouncements have often acknowledged the importance of women's contribution to the home, there has been little effort to give women a return. Only in this decade, for example, have courts begun to recognize women's investment in domestic labor as an economic contribution to be considered in dividing household assets following divorce. Homemakers do not receive their own social security benefits but rather are supposed to benefit through their husbands' contributions. In fact, only 54 percent of women receiving social security benefits make their claims on the basis of their own work records; the other 46 percent claim as wives.[35] In the case of divorced women, however, only those who qualify under very stringent conditions find that their years of contributing to their husband's maintenance and worth results in payment.

It is women's provision of care and the expectation that they should do so that does the most to make women dependent. Those who are most economically vulnerable are the women who do the most to fulfill a paternalistic and patriarchal gender ideology: they devote themselves full time to caring for their families. Any human capital investment they made in earlier years through education, training, or employment becomes devalued with each year they are homemakers,[36] and they lack the further benefits afforded by continuing job experience. They foresake both the independent security of employment and employment-related benefits including pensions, and they foresake a considerable amount of ability to provide for themselves should the need arise. Women's economic activities, however, cannot be regarded as choices in the full sense of the word. Our social policies assume that women are the primary care givers, which means there is little assistance to be offered to women who are, in addition, breadwinners. Our social welfare system depends on women either being dependent or taking on what has become to be known as the "double burden." Even when women attempt to seek employment, they continue to face job discrimination based on this gender ideology. Although it is illegal for employers to take marital or maternal status into account, they continue to devalue women as employees because of the assumption that women's primary focus of attention is the home.

Reality contradicts the persistent view that women are not providers. The majority of women are now in the labor force, including the majority of women

[35] Barbara J. Nelson, "Women's Poverty and Women's Citizenship: Some Political Consequences of Economic Marginality," *Signs* 10 (Winter 1984): 223.

[36] Marnie Mueller, "Applying Human Capital Theory to Women's Changing Work Patterns," *Journal of Social Issues* 38 (Spring 1982): 89–96.

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with children as young as two.[37] They now spend relatively few years out of the labor force. Women make important financial contributions to their households. Many people have noted that women who do not have a husband to help support themselves and their families are particularly likely to suffer from poverty. In 1983, more than one quarter of all divorced and separated women were on welfare. Thirty-seven percent of single mothers with one child were poor, as were 85 percent of single mothers with four children. But married men are also poorer if they do not have a wife who makes financial contributions to the home. Among married white couples, 9 percent of the families in which the husband was the only earner were poor compared with 3 percent in which both spouses worked. The difference is even more stark among black families, where we find 24 percent were poor if only the husband was a wage earner compared with 4 percent if both were.

Beyond Gender-Biased Social Policy

Women constitute a majority of the beneficiaries of most major social welfare programs in existence today—with the exception of unemployment insurance. Among adults receiving AFDC, the largest single item in what is regarded as the welfare budget, over 80 percent of the beneficiaries are women. As Barbara Nelson reports, women constitute 70 percent of the housing beneficiaries, 65 percent of Medicare users, 62 percent of beneficiaries of social security (Old Age, Survivors and Disability Insurance or OASDI), 57 percent of food stamp recipients, and 56 percent of Medicaid users.[38] It is no wonder. These programs are intended primarily for the poor and aged, and women are a majority of both. Indeed, they are an increasing proportion of the poor (now roughly two thirds), a phenomenon known as the "feminization of poverty."

American social policies, including those targeted particularly at helping the economically vulnerable, are not simply part of the solution, they are part of the problem. They have helped women primarily in their capacity as wives or, especially, as mothers, and not because any positive value has been placed on removing women from a dependent state. As Barbara Nelson observes, "The poorer a woman, the greater the likelihood that she makes a claim for benefits on the basis of her position as a wife or mother."[39] One of the reasons is that women's poverty is increased substantially by their economic dependence brought on by the dependence for care that others place in them. Here it must be reemphasized that those who depend on women's care include not just children and elderly relatives, but able-bodied working husbands. Moreover, whereas the more obviously vulnerable such as children and elderly relatives depend on women's care and caring, husbands have also depended psychologically

[37] Elizabeth Waldman, "Labor Force Statistics from a Family Perspective," *Monthly Labor Review* 106 (December 1983): 16–20.

[38] Nelson, "Women's Poverty and Women's Citizenship," 209–231.

[39] Ibid, 223.

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on women's dependency itself, a point made as long as a century ago by John Stuart Mill in his "Subjection of Women."[40] Although this point might suggest that gender divisions of labor make women and men mutually and, therefore, acceptably dependent upon each other, the dependency of men on women's dependency and the particular vulnerabilities of women created by others' dependence on them means we cannot properly say that the women and men in this relationship are truly interdependent, a term that would suggest more symmetry of power.[41]

Because of gender role assumptions, the family presumption in caring—that those outside the family, and especially government, have only a residual role to play—is really a presumption that women should have the primary role in caring or offering personal services and only a secondary role in financial provision. Conversely, this outlook defines men's primary role as provision and their secondary role as caring. Contrary to the standard rendition of social policy, we do not assume a single line of responsibility for caring that runs from family to other private individuals and organizations to government. Predominant beliefs and attitudes encompass a dual hierarchy of responsibility, one for provision and one for caring. For provision the line extends from the male "head of the family" outward, in ideological terms skipping over the female adult on the grounds that it is less demoralizing for a man to be supported by outside males (or agencies) than to be supported by a woman. For caring, the line extends from the wife and mother outward, in ideological terms skipping over the male adult on the grounds that men are not competent at caring or that their primary role is provision. Here lies another interesting assumption: a man cannot provide *and* care, a combination of efforts faced by most married women today. The reality contradicts the belief; women do indeed provide. There has been somewhat less change in familial patterns of caring men; their assumption of the caring role has not increased as dramatically as has women's assumption of the provision role.

In order for our policies to cease supporting the dependency of women, it is necessary for society to cease depending on women as women; that is, it is necessary that we do not define women in terms of what have up to now been considered women's unique roles and propensities toward caring. This also requires that we no longer depend on men as men or, in other words, on the man's exclusive roles as provider.

The pressing policy question that arises from this discussion is: If we abandon the gender division of responsibility in the family, who will provide and, especially, who will care? Do we place the primary responsibility on governmental

[40] John Stuart Mill, "The Subjection of Women," in Alice Rossi, ed., *Essays in Sex Equality* (Chicago: University of Chicago Press, 1970), 123–242. For a psychoanalytically based attempt to explain this relationship, see Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley: University of California Press, 1978).

[41] For more discussion of intrafamilial vulnerability and dependence see Goodin, *Protecting the Vulnerable*, chap. 4; and Patricia Tulloch, "Gender and Dependency," in Dorothy Broom, ed., *Unfinished Business: Social Justice for Women in Australia* (Sydney, Australia: Allen and Unwin, 1984).

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institutions? This is certainly the view taken by conservative critics of feminist arguments, who see women's apparent abandonment of exclusive domestic roles as both the cause of the need for social services and as a force that will weaken men's incentives to be providers. It has also been the suggestion of some early Marxist theorists, who called for the "socialization" of domestic labor, and of the influential Progressive, Charlotte Perkins Gilman, who at the turn of the century offered a slightly different picture of taking domestic labor out of the home and out of the realm of women's familial responsibility.[42]

It would be a sad commentary on the human state if our acceptance of responsibility to help others is based only on a structure of gender inequality and power hierarchies. As Robert Goodin has argued, our fundamental moral responsibilities spring from the situation of being able to help those who are vulnerable and dependent, and especially those who are vulnerable to us.[43] We have these responsibilities regardless of gender. One cannot shirk moral responsibilities on the basis of a functionalism of gender.

Goodin's theory of responsibility and vulnerability is important, because it provides a way of analyzing and assessing our hierarchies of responsibility for others. It is in the intimacy of the family that we are most likely to find both vulnerability and ability to help that is linked to specific individuals, especially with respect to the kind of necessary caring that has been defined as women's responsibility. Responsibility does move outward to family, friends, community, and others most likely to be aware of the situation and have individual and mutual ties to those who need help. By emphasizing the notion of those who are next most responsible, Goodin draws the line of caring to the community as a whole and its administrative voice, government, which, he argues, has responsibility under three circumstances: "when no one has been assigned primary responsibility," when "those with primary responsibilities . . . prove unable to discharge them," and when "the persons with primary responsibilities prove unwilling to discharge them."[44]

This construction of the residual responsibility of government does not leave us where we started, with government providing only the barest of safety nets for those who have already fallen. We know, for example, that parents are unable to work at full time jobs with inflexible schedules (as most have) and take care of dependent children at the same time. If we, as a community know this to be a pattern in a significant proportion of economically active members of our society, we could argue that we as a community, through government, have a responsibility to help. Alternative means of assistance include workplace policies that mandate more flexible job schedules; parental leave policies that allow parents leave time without making them and their families more vulnerable through loss of pay, benefits, or career opportunities; and direct or indirect provision of child care servies. Goodin argues that the purpose of social policy is

[42] Charlotte Perkins Gilman, *Women and Economics* (New York: Harper and Row, 1966).
[43] Goodin, *Protecting the Vulnerable*.
[44] Ibid, 151–52.

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to protect the vulnerable and dependent. Protecting the vulnerable implies protecting those at particular risk, not just those who are already in trouble. It follows that social policy, in seeking to protect the vulnerable and dependent, should not at the same time create vulnerability and dependency. Our minimalist social policies up to this point have done just that.

Women have suffered, in a sense, from the tendency to make relatively rigid distinctions between *social* policies and *rights* policies. There is not a space here to repeat in full the arguments that claim that the distinctions are not great and that some social policies, including the provision of certain services, constitute rights.[45] Let us, rather, briefly consider one example that has served as a theme throughout this discussion. For most of our history, Americans have accepted the idea that women should be dependent upon their husbands and that they should not, if possible, provide for themselves through gainful employment. Following from this idea, men have been accorded higher priority in training and jobs, even when there were more qualified women available. In public debate today, policies aimed at securing education and jobs for women are labelled rights policies. If we also thought of them in terms of social policy, we would be more likely to define the goals of these policies as providing for the general welfare—that is, of providing the means whereby a significant portion of the society could become more economically secure and less dependent and vulnerable. We would then not only allow women to become self-reliant, we would encourage it.[46]

This is a call for collective as well as individual responsibility and it is a criticism of crass individualism, even if that individualism is softened with an overlay of voluntaristic altruism. Advocacy of collective responsibility does not, as some critics would argue, mean the demise of the individual as an agent in society. To the contrary, it is entirely consistent with Albert Weale's argument that "there is one overriding imperative to which government action ought to be subject to its authority. This principle of autonomy asserts that all persons are entitled to respect as deliberative and purposive agents capable of formulating their own projects, and that as part of this respect there is a governmental obligation to bring into being or preserve the conditions in which this autonomy can be realized."[47]

This is precisely what has been missing in social policy as it concerns women: the preservation of conditions of autonomy. In a sense this is true for men as well, because their roles also have been dictated by prescriptions that are made on the basis of sex. But for women the prescription is dependency including dependency of identity itself.[48] Social policy has assumed that women are not au-

[45] See, for example, T.H. Marshall, "Citizenship and Social Class," in Marshall, *Sociology At The Crossroads and Other Essays* (London: Heinemann, 1963); and Mishra, *Society and Social Policy.*

[46] For a parallel discussion of policies of toleration versus liberation, see Virginia Sapiro, *The Political Integration of Women: Roles, Socialization, and Politics* (Urbana: University of Illinois Press, 1983), chap. 8.

[47] Weale, *Political Theory and Social Policy*, 42.

[48] For the classic development of this theme, see Simone de Beauvoir, *The Second Sex* (New York: Knopf, 1953).

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tonomous individuals and moral agents, but that they live contingent lives. With specific regard to their economic lives, their ability to provide for themselves and others is supposed to be contingent upon whether others around them need their caring services. Choice as a moral agent is missing. Women are defined as individuals who place themselves second. The irony is that this "altruism" often keeps them from helping not only themselves, but others they would wish and feel obligated to help.

We are in great need of constructing more humane social policy for the future and also of reinterpreting what has gone before. Historically, for vast numbers of men the individualistic ideology of self-reliance has not worked. For women it never existed.*

* I would like to thank Graham Wilson and Bob Goodin for their helpful comments and criticisms.

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Social Policy and the Welfare of Black Americans: From Rights to Resources

CHARLES V. HAMILTON

About a century ago in 1883, just before the *Political Science Quarterly* began publishing, there was a convention called in Louisville, Kentucky. It was convened by a group of black Americans and the keynote speaker was the prominent black abolitionist, publisher, and diplomat, Frederick Douglass. Already, he had almost a half century of political activism on his record. He was no stranger to the wider national audience to whom he addressed his remarks. The purpose of the convention was "to assert the political independence of the Negro at a time when the Republican party was discarding the issues on which it had based its Reconstruction policies. The Democratic party, not yet dominated by the South, had made consequential inroads into northern state governments . . ."[1] Speakers constantly referred to the political and economic conditions of black Americans. Reference was repeatedly made to the laudable language in the Constitution, contrasting that with the practice of segregation and discrimination. But there were blacks at that time who disagreed with the need for a convention in 1883. They feared it would alienate white Republican friends. This, too, has been a long-standing intraracial debate over tactics and strategy: how hard to push at any given time for equity, what issues to raise, when

[1] Leslie H. Fishel, Jr. and Benjamin Quarles, eds., *The Black American, A Documentary History* (New York: William Morrow, 1970), 299.

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to compromise, what allies to seek. Frederick Douglass touched on many topics in his keynote—the need for racial unity, political independence, civic rights, economic conditions. In one part of his speech he stated:

> While we see and hear that the South is more prosperous than it ever was before and rapidly recovering from the waste of war, while we read that it raises more cotton, sugar, rice, tobacco, corn, and other valuable products than it ever produced before, how happens it, we sternly ask, that the houses of its laborers are miserable huts, that their clothes are rags, and their food the coarsest and scantiest? How happens it that the land-owner is becoming richer and the laborer poorer ? . . .
>
> . . . The trouble is not that the colored people of the South are indolent, but that no matter how hard or how persistent may be their industry, they get barely enough for their labor to support life at the very low point at which we find them . . . .
>
> . . . Nor is it to be wondered at that the standard of morals is not higher among us, that respect for the rights of property is not stronger. The power of life and death held over labor which says you shall work for me on my own terms or starve, is a source of crime, as well as poverty.[2]

This has been a basic complaint in the black American saga. And then as now, there have been innumerable group responses to the problems of policy for the general welfare of black Americans. Even in the 1880s, there was a developing debate between those blacks following Booker T. Washington, who counseled emphasis on agricultural training and self-help enterprises on the one hand, and those (later to be associated with W.E.B. DuBois) who urged more agitation for political rights and liberal education. It was precisely in the 1880s and 1890s that we began to see the development of many local self-help associations, in the form of benevolent and insurance societies, frequently started by the local black churches. Child care facilities, elementary schools, and elderly care arrangements were not uncommon in many black communities as the result of efforts of black ministers and their parishioners. In a sense, the post-Reconstruction period is a most important time to study the process of racial consolidation taking place in several black communities. National post-Civil War concerns were waning. The Freedmen's Bureau concept was no longer supported. Southern state governments were being reclaimed by former secessionists and imposing racially restrictive constitutions and laws. Communal bonds among blacks in politically and economically vulnerable communities had to be forged if many people were to survive.

The Persistent Racial Factor

The United States has always had its values tested by the phenomenon of race. Slavery made this inevitable. A society that could proclaim all men to be created equal and still sanction slavery was bound to be faced with basic moral dilemmas. The framers of the Constitution dealt with the issue in two ways: by pro-

[2] Ibid., 303-304.

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hibiting the further importation of slaves after 1807, and by devising a 3/5 calculation for counting slaves as a basis for determining the population size of each state for purposes of representation in the House of Representatives and the number of electoral votes in presidential elections. Hardly decisions that would adequately meet the moral issue of human bondage.

Thus, the society fell back on a privatized approach to the dilemma, letting private slaveholders decide whether to manumit their slaves or not. Indeed, placing the general welfare of the slaves in the hands of the citizens who owned them assumed, of course, that that was the only, if not the best, place for decisions to be made about the level and quality of care.

The historical fact of slavery in the United States is perhaps the most fundamental factor related to our current understanding of race and social policy. This is true not only in the sense of the economic and political legacies, which are obvious and important, but in a more profound social psychological sense that affects the thinking of the heirs of slaves and slaveholders in varying ways. Virtually all other people came to this country seeking to obtain property. Blacks came to this country as property. This sheer basic distinction is so important as to set the stage and to influence substantially the development of social policy and political discourse throughout the 118 years after the constitutional abolition of slavery. I will devote this article to an examination of why and how that is so, concluding with some implications for the topic of this journal's symposium: "promoting the general welfare."

That the country has evolved a long way in its race relations should not require emphasis. Once there was slavery. Today there is not. Once there were constitutionally-sanctioned laws permitting overt racial segregation and discrimination. Today there are not. Once some activities were simply understood (without the need for laws or overt pronouncements) to be reserved for white males—for example, playing basketball on a professional team. Today, if such a team was so constituted, it would probably be laughed off the court (not to mention, taken to court) for noncompetitive performance. The list of changes is long, and the reservations, modifiers, and temporizing evaluations are equally long. Perhaps as important in this saga is the fact that many of the changes are relatively recent. In 1961, northern daily newspapers ran want ads for "White Males Only." In 1963, Martin Luther King, Jr. was in a Birmingham jail for violating an injunction against demonstrating against racial segregation and denial of voting rights in that southern city. Today, the mayor of Birmingham is a black American.

The persistent, gnawing problem with talking about these important, undeniably significant changes is, to me, the problem raised a century ago by Frederick Douglass. And it simply seems not to go away or even yield to the sorts of changes in the political realm we can cite. To be sure, blacks are in a much improved economic status over, say, fifty years ago. They hold jobs in the private economy unheard of even ten years ago. There are vast stretches of upper-middle-class black communities in urban areas (for instance, Baldwin Hills in Los Angeles; Collier Heights in Atlanta). But it is also the case that the overall

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economic status of blacks in relation to the larger society has not matched the changes in the political-legal-constitutional realms. Perhaps this is partially explained by the decisions made by earlier civil rights groups regarding where to concentrate their energies. I believe much of the answer lies in the vastly different nature of the problems posed by economic and social disparities as compared to political disparities. If blacks did not vote, it was because they forgot, chose not to do so, or were prohibited by various devices. Government could and did reasonably deal with the latter cause. If blacks could not patronize a hotel, it was because they chose not to do so for various individual choice reasons or were prohibited from doing so by racial laws and practices. Government could and did remove the latter barriers.

But when we look at other phenomena such as getting a decent job, living in a comfortable home and neighborhood, even obtaining adequate health care and quality education, the things government tried to do are more problematic. Advocates for racial progress have always been sensitive to the need to raise socio-economic issues. Douglass was only one in a long line of leaders and organizations calling attention to the economic plight and social welfare of their constituents. The Afro-American League, formed in 1890, called for the establishment of Afro-American banks, cooperative industries, and various lobbying activities aimed at training and relocating black workers.

In 1905, a group of black intellectuals led by W.E.B. DuBois and William Monroe Trotter, editor of the Boston *Guardian*, convened the Niagara Movement, which later—1909—merged with the National Association for the Advancement of Colored People. The group vehemently protested any conciliatory efforts to resolve racial problems. One portion of its statement read:

> We especially complain against the denial of equal opportunities to us in economic life; in the rural districts of the south this amounts to peonage and virtual slavery; all over the south it tends to crush labor and small business enterprises; and everywhere American prejudice, helped often by iniquitous laws, is making it more difficult for Negro-Americans to earn a decent living.

This concern for economic conditions continued, but it is accurate to say that what came to be identified as America's twentieth century civil rights movement was largely associated until the mid-1960s with a legal struggle to overcome *de jure* segregation. Without question, black organizations such as the National Urban League always emphasized economic issues. That group was particularly keen on monitoring the development of New Deal laws, pushing for measures throughout the 1930s that would provide a stronger economic base for blacks. The Urban League championed "jobs not alms."

> It [National Urban League] favored New Deal programs that provided work rather than relief, that were administered by the federal government with regulations limiting state and local autonomy, that gave priority for benefits to those most in need, that had a white-collar component, that had a nondiscriminatory clause preventing discrimina-

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tion, that did not have a black quota, and that included blacks in the administration of programs.[3]

These policy positions did not, of course, always, or frequently, prevail. The lobbying the Urban League was able to do in the national corridors of Congress was at best limited. Blacks were not a significant voting bloc there; thus they had virtually no political leverage. Therefore, several factors contributed to an earlier civil rights movement focusing on overcoming legal barriers to political and civic citizenship.

A Movement for Civil Rights

The politics of race in the United States has been mainly a struggle to restructure constitutional meaning and to establish certain legal claims. This emphasis was necessary precisely because the citizenship status of blacks was defined for a long period as quite different from that of whites. Any student of this subject is aware of Justice Roger B. Taney's opinion for a majority Supreme Court in *Dred Scott* v. *Sandford* (1857): "[At] the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted . . . [blacks] had no rights which the white man was bound to respect."[4] After the abolition of slavery and with the passage of the three post-Civil War Amendments (13th, 14th, 15th), approximately one hundred years ensued – into the 1960s – that were devoted essentially to interpreting the new *constitutional* status of the emancipated black citizens.

Thus, a "civil rights" movement developed that saw ninety-five years (1870–1965) devoted to establishing the privilege of blacks to vote unencumbered by racial barriers. That is, from the ratification of the 15th Amendment to the passage of the Voting Rights Law of 1965. And it is important to observe that for roughly the first eighty-seven of those years (1870–1957), the main arena was the court system. Congress and the presidency were not principal participants, because the political constituencies supporting their elections did not favor such participation. Civil rights advocates went to federal courts to challenge "grandfather clauses," white primaries, evasive voter registration practices, as well as economic intimidation.[5]

A "civil rights" movement devoted fifty-seven continuous years (1897 to 1954) to overcoming the "separate but equal" segregation doctrine of *Plessy v. Fer-*

[3] Dona Cooper Hamilton, "The National Urban League and New Deal Programs," *Social Service Review* 58 (June 1984): 227–243.

[4] 60 U.S. 393, 407 (1857). For a comprehensive account and analysis of the subject in early American constitutional law, see A. Leon Higginbotham, Jr., *In the Matter of Color, Race and the American Legal Process, The Colonial Period* (New York: Oxford University Press, 1978).

[5] See: V.O. Key, Jr., *Southern Politics* (New York: Vintage Books, 1949); Charles V. Hamilton, *The Bench and the Ballot* (New York: Oxford University Press, 1973); and Steven F. Lawson, *Black Ballots: Voting Rights in the South*, 1944–1969 (New York: Columbia University Press, 1976).

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guson (1897),[6] culminating in the *Brown v. Board of Education*[7] school desegregation cases of 1954. Again, not Congress, not the executive, but the courts were the stages on which this "politics of race" was played out. Civil rights advocates went to court to end racially restrictive covenants in real estate transactions.[8] Energies and resources were devoted to court battles to overcome *de jure* segregation of public accommodation, as well as to end discrimination in jury selection, disparities in teachers' salaries, and segregation in interstate travel.

These were important, tedious battles requiring years of careful planning, testing, retesting, and improvising. This experiential context created a cadre of constitutional lawyers who became in a real sense the focal points of the civil rights struggle. Even as from time to time masses took to the streets to engage in protest demonstrations or in boycotts, invariably they turned to their legal leaders to take their cases to court, to argue the constitutional justification for their actions. Such was the situation in the famous Montgomery, Alabama bus boycott from 1955 to 1957 that launched the leadership of Martin Luther King, Jr. That particular episode began appropriately enough when a tired seamstress, Rosa Parks, refused to abide by municipal law requiring her to sit in the rear of the city bus. And it ended when the U.S. Supreme Court in *Gayle v. Browder* said she did not have to do so.[9]

In her book, *Groundwork, Charles Hamilton Houston and the Struggle for Civil Rights,* Genna Rae McNeil describes the work and thinking of one of the architects of the modern legal civil rights movement.[10]

> In the Court a black man could "compel a white man to listen," and reforms could be forced when blacks had no chance through politics. So convinced was Charles Houston of the correctness of his theory of social engineering and its potential with respect to prompting a nondiscriminatory interpretation of the Constitution or federal statutes that he taught students a lawyer was either a social engineer or a parasite on society.
>
> In its reliance on resort to courts for gaining recognition of their constitutional rights, social engineering was consistent with the traditional faith of African-Americans in the possibility of changing their subordinate status not only through resistance but also through protests and appeals based in the expressed fundamental principles of the U.S. government. The influence of social engineering on the black jurisprudential matrix was significant and novel in its exposition of the duties of black American lawyers and its presentation of the rationale for use of the law by blacks.[11]

The lawyers were well aware of the tasks they had to perform. They knew the legal precedents they had to challenge. McNeil wrote:

> In planning his activity [Houston] took into account *stare decisis*, judicial self-restraint, the step-by-step process and the requirement of reasonable predictability of legal conse-

[6] 163 U.S. 537 (1896).
[7] 347 U.S. 483 (1954).
[8] *Shelley v. Kraemer*, 334 U.S. 1 (1948).
[9] 352 U.S. 903 (1956).
[10] Genna Rae McNeil, *Groundwork* (Philadelphia: University of Pennsylvania Press, 1983).
[11] Ibid., 217-218.

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quences. The result was a three-pronged strategy: selecting cases that presented clear legal issues and building strong records in those cases; overturning negative legal decisions by invalidating gradually or attacking directly the controlling precedents, and developing a sustaining community or mass interest in each case.[12]

In the United States for almost one hundred years, the welfare of black Americans was generally and predominantly consumed by attention to constitutional rights and legal, court-ordered remedies. The politics of race was a struggle for rights—namely, civil and political. It was a struggle to achieve voting rights and overcome *de jure* segregation, to implement the "correct" meaning of the Constitution. It was a struggle embedded in legal doctrine and constitutional principles, relying heavily, precisely because it was so legalistic, on moralism to make its case. It hired lawyers, solicited plaintiffs, and went to court, filing class-action lawsuits. Civil rights proponents amassed evidence and fashioned imaginative constitutional arguments to overcome ingenious efforts at constitutional subterfuge.

This civil *rights* movement developed at the same time we were witnessing the development of pluralist politics in this country. And very much of the latter, especially in the northern urban area, was infused with a heavy dose of ethnicity. As blacks were coming out of slavery and going into courts, immigrant groups were coming out of Europe, passing through Ellis Island, and going into local political clubs and machines. A great part of American pluralist politics, then, had a flavor of the politics of ethnicity. But while the politics of race was characterized by a struggle for *rights*, the politics of plural-ethnicity was characterized by a struggle for *resources*. The latter was a struggle to capture and control public office and the ability to dispense patronage and divisible and indivisible benefits. Instead of nurturing and training lawyers and plaintiffs, plural-ethnicity focused on precinct captains and patronage. Votes properly mobilized, not evidence clearly presented, were the main weapons. While the black racial political struggle utilized constitutional lawyers as sophisticated interpreters of new constitutional meaning, the ethnics utilized lawyers to interpret immigration rules, obtain pushcart licenses, and negotiate the bureaucratic passage from alien to citizen. Both roles were fundamentally critical, but also fundamentally different. This is not an experiential distinction to be overlooked by students of politicization and social change. The point is the following: when the civil rights struggle evolved from rights to resources, as it certainly did beginning substantially in the 1960s, it took with it the orientation, language, and some of the tactics of the earlier struggle.

As we moved into the 1960s with certain achievements over *de jure* segregation, attention became increasingly focused on the socio-economic welfare of blacks and other "Other Americans." Those "others" were pointed out by such policy analysts as Michael Harrington.[13]

[12] Ibid., 219.

[13] Michael Harrington, *The Other America* (New York: Macmillan, 1964).

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From Rights to Resources

As far as I can tell, few earlier civil rights advocates really assumed that merely ending *de jure* segregation would be in itself sufficient to achieve decent socioeconomic status for black Americans. Rather, one knew that this was an important prerequisite that inevitably would lead to other demands, other goals, other agendas. And so it did in the early to mid-1960s, when the civil rights marches and demonstrations moved beyond the South and focused on northern urban ghettoes. Riots in cities beginning in 1964 led to a stream of "long hot summers." The Johnson administration launched a Great Society antipoverty crusade, and a presidential commission in 1968 warned that the nation was fast becoming two societies: one black, the other white. That commission focused on "white racism" as a major cause. Right or wrong, it was part of the rhetoric and the reasoning behind much of the policy deliberations at the time.

Given the historical context out of which these events developed, it should not have been surprising that this new thrust would carry with it a heavy emphasis on "rights," almost in the sense of moral as well as legal claims. It is, therefore, no accident that we saw the development of a National Welfare Rights Organization, laying almost legal claim to a decent public assistance check and increased benefits. We began to see emphasis on certain legal remedies to compensate for past racial discrimination moving in the direction of greater and more specific codification of such policies as the "Philadelphia Plan"—a Nixon administration policy relating to hiring of black workers by government contractors. "Affirmative Action" became a policy focus, covering guidelines, timetables, and quotas in the recruitment and promotion of previously excluded groups, especially blacks. We began to see the heightened politicization of other groups, notably feminists, environmentalists, the elderly, children, the handicapped, and homosexuals organizing and demanding their "rights."

In other words, what many Americans had once understood as proper issues over which pluralist politicians bargained were fast becoming public goods to which legal claims were laid. Neither is it coincidental that the courts would be called upon to play a central role. After all, it was the judicial system that had taken much of the lead in the previous century-long civil rights struggle.

The country witnessed the democratic civil rights struggle over constitutional rights broadened to encompass a legal struggle over resources. The move from rights to resources also involved a movement for resources as a matter of right. And this development disturbed more than a few supporters of the earlier civil rights cause. One such person, Morris B. Abram, appointed by President Reagan as vice chairman of the United States Commission on Civil Rights, put his disturbance in the following way:

> Civil rights have a unique meaning in this country. Elsewhere, in some of those societies where engineering a certain distribution of wealth and goods is part of the state's mission, people have economic rights—the right to housing, health care and other goods. But civil rights have a different meaning in this country . . . .

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> . . . The allocation of economic resources is obviously important to the social progress of American blacks. But that does not turn economic needs into civil rights. There is no doubt that Federal spending, for instance, it necessary to improve the condition of the poor, including the black poor. Society is *ethically* compelled to provide for the poor and the disadvantaged. But people do not have a constitutional right to health care or housing subsidies, any more than a farmer has a constitutional right to a tobacco subsidy, or Chrysler to a bailout. There may be sound reasons—moral, practical or otherwise—*for providing these things, but they are not civil rights* . . . .
>
> . . . by treating economics as civil rights, the new movement lost the dawning societal consensus. When economic and social goals were asserted as civil rights, the movement lost a certain moral force and its unity was fractured. Americans, who were persuaded to salute civil rights as they did the flag, were not willing to pledge allegiance to a certain level of food-stamp spending.[14]

I think Abram captures the views of many who found themselves unable to remain allied with their former coworkers in the earlier civil rights vineyards. He relies heavily on the Constitution. Our constitutional democracy, he notes, is not built on the proposition "that each has a fundamental entitlement to a particular piece of the economic pie." The "new movement treated economic claims as civil rights, by embracing an idea of 'rights' that included economic entitlements—a 'right' to shelter, a 'right' to health care, a 'right' to day care for children. The movement demanded these 'rights' even though none of them are to be found in the Constitution."[15]

But it should not be forgotten that the earlier civil rights movement faced similar arguments when it championed desegregation of public schools. More than a few advocates of states' rights argued that the Constitution did not mandate action by the federal government to achieve desegregation. They pointed to *Plessy v. Ferguson* and other court opinions interpreting the 14th Amendment as entirely consistent with the "separate but equal" doctrine. But the Warren court disagreed and, employing a different approach to the interpretation of the Constitution, concluded in 1954:

> In approaching this problem, we cannot turn the clock back to 1868 when the [14th] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[16]

This "experiential" approach to interpreting the meaning of constitutional provisions is not agreed to by all constitutional scholars, but neither is it uncommon or particularly unacceptable to many advocates of social change

[14] Morris B. Abram, "What Constitutes a Civil Right?" *The New York Times Magazine*, 10 June 1984, 52, 54.

[15] Ibid., 54.

[16] 347 U.S. 483 (1954).

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through the judicial system.[17] To be sure, it is controversial, but the matter is not properly dealt with by the simplistic assertion that if the specific policy goal sought is not specifically "found in the Constitution," it is therefore not constitutionally required. The American political system is not so narrowly bound. If it were so, more than a few New Deal provisions—especially in the field of interstate commerce—would not have survived.

But the purpose here is not to turn a discussion of the "right to resources" on the narrow axis of court-driven judicial decision making. Rather it is to cast the analysis in a broader context of societal development and the needs and requirements of the populace as we approach the twenty-first century. Many things may ultimately end up in court (and if Alexis de Tocqueville is correct, they likely will), but public policy need not begin there. To be sure, the courts were, in many ways, the catalysts for defining civil rights. But the very success of that struggle broadened the base of socio-political participation to the point where the other branches of government are more open to the advocates of progressive social change than was the case decades ago.

Neither should we forget the genesis of the New Deal. Out of that period of perceived need were fashioned a series of programs leading to "entitlements." They were not, in the technical sense, considered "rights," but the political circumstances combined with some contributory aspects of program construction to establish a well-entrenched social insurance system. We must not forget President Franklin D. Roosevelt's observation in 1935 regarding employee taxes to partially finance his social security package: "We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions and their unemployment benefits. With those taxes in there, no damn politician can ever scrap my Social Security program."[18]

The current movement to "right to resources" is essentially a political thrust aimed at responding to the age-old question: who should be helped? In the 1980s, we are involved in reexamining the validity of the two-tier social welfare system put into place fifty years ago. That system was based on certain premises and assumptions about the capacity of the market economy, the role of government, and what citizenship required. Given the enormous changes in the economic environment, it is not surprising that those fundamental premises and assumptions would need rethinking. The conditions that led to implementation of the initial American welfare state have altered.

Black Americans were important components of, but marginal actors in, the initial formulation. Indeed, the original social security legislation of 1935 did not cover two-thirds of blacks. Today, after a reasonably successful civil rights movement focusing on *de jure* segregation, blacks and other minorities are making demands for more inclusive social programs to meet their needs. These

[17] This approach is fully developed in C. Herman Pritchett, *The American Constitution* (New York: McGraw-Hill, 1959).

[18] Quoted in Arthur M. Schlesinger, Jr., *The Coming of the New Deal* (Boston: Houghton Mifflin, 1959), 308–309.

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demands might frequently be couched in terms of "right," but I suggest in the social welfare "entitlement" sense, not necessarily in the sense of new constitutional amendments.

Therefore, to be "entitled" to a living wage might require adequate job training programs, or available day care, or even the guarantee of employment. This could well carry with it the obligation to take such employment if available in order to qualify for a possible wage subsidy—which could take several forms, including a variant of the negative income tax.

The "right to resources" properly understood could well involve the "responsibility for reciprocation"—amounting to a modern-day variant of "contributions." If understood in this way, it is not necessary that we remain locked into a fifty-year conceptualization of the social welfare system. Income-earning activity remains the fundamental basis for linking individuals and families to the community. Future social policies starting from the premise of work, of employment and building on whatever social supports are necessary could well take on a viable characteristic of entitlement. And I suspect this could have substantial political support in the society.

Civil rights groups throughout the years have always championed "jobs, not alms." This was true in the Depression. It was the case with the threatened 1940 March on Washington that persuaded Roosevelt to issue Executive Order 8802. One should not forget that the 1963 March on Washington was for "*Jobs* and Freedom." The little remembered Freedom Budget proposed by A. Philip Randolph in the 1960s emphasized full employment. And, of course, there was the early Humphrey-Hawkins bill in the 1970s calling for a right to a job.

It is important to note these things, because a peculiar phenomenon has crept into the policy discussions pertaining to social welfare and race. There has developed a notion that large segments of the black population are disinclined toward the work world. Various reasons are given: they are discouraged, discriminated against, derelict, disabled, unskilled, and part of the "culture of poverty." Innumerable analyses of work incentives and disincentives associated with welfare policies have appeared. Careers have been built around devising ways to teach good work habits and generally orient young blacks, especially, toward the day-to-day world of work.

Some of these developments would appear strange to the followers of Frederick Douglass, to the sharecroppers in the South, and to the black workers and their organizations that have over the years campaigned for more jobs. The movement for right-to-resources serves a basic function—to the extent that it persists in pushing primarily a full-employment agenda—in challenging notions of indolence, as well as the view that jobs are plentiful, but going unfulfilled.

To the extent that there is a potential convergence of policy agendas, the issue of "work" might serve as one point of departure. One group calls for "workfare," with and without punitive connotations. Another wants "jobs." Common to both is "working." Workfare builds from a welfare base: first the person receives public assistance and then must "work off" (pay-back) a certain amount of the

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benefits received. The unfortunate aspect here is that the person is still anchored in the dependent world of "welfare."[19]

On the other hand, providing a job first, and then, if necessary, supplying support (wage subsidies, preferably), anchors the person in the world of "work." With the latter go other benefits received by most workers in the society: pension benefits, perhaps union protections, vacations, wage increases, chances for promotion. There will always be the need to help some persons beyond merely providing a job and subsidized wages. But it is far better to build that social service system on the base of a work-oriented social system where, incidentally, the requirements to accept a job *before* other benefits are available could be quite stringent – but not punitive. I suspect such an approach could receive substantial political support, and it ought to be understood as leading to a universal entitlement. The basis for such a policy, in the final analysis, is the same as that which ultimately justifies and sustains other "entitlement" components of the American social insurance system.

Entitlements and the General Welfare: Dependency vs. Poverty

I believe we are still tied to a fifty-year old conceptualization of social welfare programs that had its genesis in the New Deal. We developed a two-tier set of social welfare policies: social insurance, which would protect against *dependency* on government or private charity (in old age, from unemployment, from disability); public assistance, which would provide *temporary* help to tide people over until they could care for themselves, or at least no longer need such help. In a way, it was both easy and acceptable to structure the New Deal programs in such a manner. These policies clearly supported deeply embedded values of the minimal state, individual liberty, and a preference for the market economy. Although governmental agencies proliferated, the social insurance tier was based on contributions from private employers and workers. The role of the federal government was mainly that of a repository. In addition, state and local agencies were given a major role in administering many public assistance programs.

In addition, the basic aim of the New Deal social insurance programs was not really to protect against poverty as such, but to guard against dependency. This country has only recently – very recently, the last twenty to twenty-five years – seen poverty as a condition that public policy ought to try to *eradicate.* Americans do not have a long history of perceiving the poor in the way that the uneducated have been perceived. In other words, the right to a public education is much stronger than the right to a decent (above poverty level) livelihood. In fact, one might argue, as I do, that there has always been the assumption that in a market economy there would be rich people and poor people, with a reasonably stable group in between. James Madison, in *Federalist No. 10* wrote:

> . . . the most common and durable source of factions has been the various and unequal

[19] I recognize that some versions of "workfare" call for moving recipients into private sector jobs when available.

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> distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.[20]

Americans implicitly accept this analysis even if their rhetoric of egalitarianism is otherwise. They frequently talk antipoverty, but invariably their critical policies are aimed at minimizing dependency on the government dole.

Senator Daniel P. Moynihan has tapped the ideological source of this preference with the following observation:

> The issue of welfare is the issue of dependency. It is different from poverty. To be poor is an objective condition; to be dependent, a subjective one as well. That the two circumstances interact is evident enough, and it is no secret that they are frequently combined. Yet a distinction must be made. Being poor is often associated with considerable personal qualities; being dependent rarely so. This is not to say that dependent people are not brave, resourceful, admirable, but simply that their situation is never enviable, and rarely admired. It is an incomplete state in life: normal in the child, abnormal in the adult. In a world where completed men and women stand on their own feet, persons who are dependent—as the buried imagery of the world denotes—hang.[21]

American social policy has been moved less by the fact that many are poor, but that they should not be or become dependent on government and taxes paid by the nondependent. If they were the former, then surely a sound market economy with a decent amount of labor skills would provide the opportunity for those poor to work their way out of poverty. This was the theoretical preference, and the social welfare policies followed.

The country's policies for the most part have been constructed to provide a "floor," a minimum that would permit people not to become absolutely destitute. This might leave them still poor, but they need not be dependent on public charity. The monthly social security check would not necessarily be generous, but it was earned through earlier contributions, and it constituted a steady income. It would help toward alleviating the need to be dependent on one's family (children, especially) and friends and voluntary associations. In this sense, antidependency rather than antipoverty was the primary policy goal. In pursuing this goal, we devised a social insurance system whereby people would contribute through their payroll taxes, thus avoiding the later stigma of receiving "something for nothing." People in that condition were not only poor, but also dependent, and subject to the kind of societal disapprobation described by Moynihan.

We must not overlook that even a staunch New Dealer, Harry Hopkins, probably articulated the prevailing attitude of his colleagues: "I don't think anybody can go on year after year, month after month accepting relief without affecting his character in some way unfavorably. It is probably going to undermine the *independence* of hundreds of thousands of families. Give a man a dole, and you

[20] James Madison, *The Federalist Papers*, no. 10 (New York: New American Library, 1961), 79.
[21] Daniel P. Moynihan, *The Politics of a Guaranteed Income* (New York: Random House, 1973), 17.

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save his body and destroy his spirit. Give him a job and pay him an assured wage and you save both the body and the spirit."[22]

Hopkins's boss, President Franklin D. Roosevelt, was no less certain: ". . . continued dependence upon relief induces a spiritual and moral disintegration fundamentally destructive to the national fibre. To dole out relief in this way is to administer a narcotic, a subtle destroyer of the human spirit." Roosevelt, in January 1935, stated that the federal government "must and shall quit this business of relief."[23]

If permanent dependency was the condition to be minimized, it is important to note that most people felt that, if given the chance, the poor could work themselves into self-dependency, if not into affluence. The goal was self-dependency. And this has always been seen as a cumulative, intergenerational matter. The poor, but independent, today would pave the way through hard labor and delayed gratification for their children to be a little better off for themselves in the future—hopefully, not only independent, but not poor either. All this was consistent with the basic norms of the minimal state, individual liberty, and the sanctity of the market economy.

The minimal state referred to both the source and the nature of the intervention. Better one should be self-reliant. If not possible, then private charity would step in. If necessary, then local and state help. If totally unavoidable, then the national government should intervene. But always, the role of and the assistance provided by the public sector should in no way compete with the private sector. During the New Deal, for example, wages and projects under work-relief were not to compete with the private labor market. "A major effort was made to get 'employables' reabsorbed into the private sector labor market, and means-testing became more severe."[24]

Franklin D. Roosevelt's words upon signing the Social Security Act are interesting to note:

> It is a structure intended to lessen the force of possible future depressions. It will act as a protection to future Administrations against the necessity of going deeply into debt to furnish relief to the needy . . . . It is, in short, a law that will take care of human needs and at the same time provide for the United States an economic structure of vastly greater soundness.[25]

So the New Deal put into place a set of first-tier social insurance programs deliberately geared to alleviate dependency, not necessarily poverty. If the latter came with the former, so much the better. There was nothing inherently contradictory with societal values to have a mass of poor; but a mass of dependents

[22] Quoted in James T. Patterson, *America's Struggle Against Poverty, 1900–1980* (Cambridge, Mass.: Harvard University Press, 1981), 59. (Emphasis added.)

[23] Ibid.

[24] Dona Cooper Hamilton, "National Urban League," 230.

[25] William E. Leuchtenburg, ed., *The New Deal, Documentary History of the United States* (Columbia: University of South Carolina Press, 1968), 79.

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on government doles was inconsistent with a viable capitalist economy and society.

Neither does this basic normative orientation violate the premise of the second tier of welfare programs, those for that dependent population that could not work. These were the "deserving poor," the widow of the West Virginia coal miner killed in a mining accident leaving a wife and small dependent children. The aged who had not been able to save (pre-social insurance) for retirement; the blind. Surely, these people *deserved* to be helped. But equally as important, such help would only need to be temporary. Recipients of second-tier assistance would grow up and enter the labor market, remarry, or be cared for by the family. To be sure, there would always be some persons poor and dependent, but such a group would likely never be exceptionally large or socially disruptive. For the most part, means-tested welfare programs were understood as stopgap, temporary measures.

Underlying this basic two-tier conceptual social welfare policy framework was an employment market that presumably could absorb a reasonably expanding labor force. And lest we forget, notions of the family centered around a father who would work outside the home and a wife and mother who would stay at home and care for (work!) the children. That at infrequent times the family would be "poor" was less important than that the basis be there for the family—in time—to become economically self-sustaining.

So it was then. And the country went into and came out of World War II confident that its societal norms, values, and interests, while stressed by a depression and a war, were reasonably correct and well-founded. There was no reason to believe otherwise. The postwar boom worked in its favor. Suburbs opened up, aided by just the "right kind" of government assistance in the form of the national highway act, the Veterans' Administration and Federal Housing Administration loans, and urban renewal. A skilled labor force was available, aided by just the right kind of government assistance in the form of a compensatory-oriented G.I. bill for veterans.

A civil rights movement was moving in the direction, if not always at the pace, many people felt consistent with American values. And there were few, if any, hints of the economic implications of such a dynamic struggle once it reached its developed political thrust. That is, a black American struggle for *rights* in the 1940s through early 1960s had not yet been fully understood in terms of inevitable demands to come in the form of a struggle for *resources*. Thus, even this most significant of twentieth-century social movements was perceived as compatible with traditional American values, interests, and norms. It is not insignificant that Kenneth B. Clark could characterize the civil rights movement, proudly and, I think, accurately, in the following way:

> . . . civil rights organizations were never revolutionary. Their assumptions and strategy and tactics were essentially conservative, in that they did not seek to change and certainly made no attempt to overthrow the basic political and economic structure. The

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social changes they sought were limited to the inclusion of the Negro in the existing society; the Negro wanted his own status raised to that of other American citizens.[26]

In socio-economic terms, this would mean being provided the same means of becoming self-reliant as traditionally offered to other Americans. And that would mean being offered a labor market capable of utilizing the existing labor skills. This, beginning in the 1960s and 1970s, if not before, surely became the problem. Several fundamental changes in the economy were taking place: automation, foreign competition, women going into the labor force, and poor educational training to match the market needs. All converged to make maximum employment possibilities for many blacks, especially teen-agers, problematic. And yet, work, a job, income-earning activity remained the cornerstone of the American economic system.

Americans are willing to countenance many things in the name of "entitlements" if there is a reciprocal, contributory element involved. This is not "rights" in the constitutional sense. It is a sense of the social contract that says one is "entitled" if one has performed—contribution to a social security payroll tax, worked on a job where an injury resulted, worked before being laid off. This tends to satisfy the need to give something for something in return. It mitigates against the stigma of dependency. This tends to demonstrate that one's basic drive for self-reliance is not blunted. Entitlement in such circumstances is much more likely established or accepted as social policy than if that contributory aspect is not present. The social benefit can then be comfortably perceived as an earned entitlement.

This basic characteristic of American social welfare policy, namely, the preference for reciprocity, will likely not recede in the near or distant future. But it must be assessed in terms of vastly changed conditions. And this, it seems, is the challenge to at least one piece of the general welfare saga on the evolving American social policy scene. Resources will continue to be allocated to masses of people on the basis of earned income. Social policies will continue to be more generous to those who work than to those who do not. This applies to retirement plans (public and private), health care benefits, as well as compensatory assistance of all kinds.

Americans continue to see the national interest best served by a citizenry that is minimally dependent on government. Employment remains the first route out of the dependent state. Therefore, socio-economic policies that emphasize first and foremost the provision of employment (not only in terms of opportunities, but in actual available jobs) becomes a matter of the highest national interest.

My argument is simply: it is not in the national interest to have a vast and growing body of able-bodied citizens in the society who are dependent on government programs and who do not work. If this condition cannot be remedied by the private labor market, it is in the national interest that it be dealt with

[26] Kenneth B. Clark, "The Civil Rights Movement: Momentum and Organization," in Richard P. Young, ed., *Roots of Rebellion, The Evolution of Black Politics and Protest Since World War II* (New York: Harper & Row, 1970).

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by the public sector. If wages need to be subsidized, this should be national general welfare policy. This will not cure all the many social problems faced today, but it ought to be a minimal prerequisite in that direction.

"Employment entitlement" puts citizens in the economy in a socially acceptable way. It opens the door for ultimate self-reliance. People work for pay, rather than for welfare ("workfare" in its various forms). Welfare supports dependency; it can be compassionate; it often will be necessary. Employment actively encourages self-reliance and instills the important attribute of social reciprocity, communal exchange in a mutually beneficial way.

This is the basis for understanding the new circumstances in which we find ourselves, much as the country fifty years ago had to adapt to a new set of conditions arising out of the New Deal and the Depression. The basic values, interests, and norms were not overthrown; they were flexible. The assumptions then about the market economy cannot be entertained in these times. The necessity for employment remains basic. Providing that necessity is not the end, neither is it a guarantee of egalitarianism. A job does not guarantee individual achievement and development. It is a recognition of what is basic in the twenty-first century to guard against dependency and to promote the possibility of self-reliance. Individual talents and seizing opportunities will always operate to differentiate the citizenry.

The American civil rights movement, clearly one of the most important experiments in the nation's history, led the way in defining civic and political rights in the twentieth century. That experience, refocusing now on socio-economic resources through an entitlement of jobs, with additional direct potential beneficiaries (black Americans are not the only—only the most visible—citizens subject to dependency) ought to be instructive in how to lead a society *in its own best interest* to a still higher stage of modernity.

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Press Freedom and the General Welfare

DORIS A. GRABER

Congress shall make no law . . . abridging the freedom of speech, or of the press.

When evaluating concepts like freedom of speech and of the press, it is prudent to look beyond the benefit side of the ledger to the cost side as well. Only then can one judge whether benefits are worth the costs or whether one is paying too much for the proverbial whistle. Such a cost-benefit analysis has rarely been undertaken when it comes to press freedom. The importance of a free press has been so axiomatic that its presumed benefits have seldom been questioned, at least not publicly. There has been a good deal of discussion about the costs of press freedom when it clashes with other rights, such as citizen privacy, fair trials in the courts, or national security needs. But the belief that the benefits outweigh the costs because a free press is essential to sustaining American democracy has remained beyond doubt. With the bicentennial of constitutional protection of a free press approaching, it seems high time to examine the accuracy of this belief.

What are the functions that make the press such a significant contributor to American democracy and the "general welfare" that its freedom has been constitutionally placed beyond the control of Congress and that it claims and enjoys a privileged status in American society? A survey of American political writings drawn from the pronouncements of its most renowned political leaders and from

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the opinions of Supreme Court justices and First Amendment scholars suggests that there are five functions.

First, a free press, reflecting the diversity of opinions throughout the country, provides a forum for discussion of many conflicting ideas. This widely publicized interchange reveals the strengths and weaknesses of various proposals and, ultimately, leads to the adoption of the soundest ideas. Second, a free press furnishes citizens with the information that they need to perform the duties of citizenship adequately. It permits citizens to evaluate the performance of their current leaders and of candidates for office. It also permits them to judge the soundness of past and proposed governmental actions and alerts them to the need for citizen intervention into ongoing political affairs. Third, a free press is the public's agent in communicating with government officials. It articulates the public's interests to the government and gives voice to public opinion. Fourth, a free press provides an outlet for public expression of unpopular minority views. Fifth, acting as the public's agent, a free press constitutes the citizens' eyes and ears to detect and report corruption, abuses of power, and other misconduct by government officials.

Examination of the record of nearly 200 years of press performance under the protective wing of the First Amendment to the Constitution clearly indicates that the American press—which encompasses print and electronic mass circulation media—has slighted significant functions that the Founding Fathers and their spiritual heirs assumed it could and would perform. The failure of the press to perform these functions adequately has substantially diminished its contributions to the vigor of American democracy. Let us look at the performance record for each of these functions and at the reasons for press shortcomings.

It should be noted at the outset that this inquiry does not proceed from the untenable assumption that the press can be a paragon of perfection. All human institutions are flawed and the press is no exception. It must be expected to be derelict at times in carrying out its duties, and it must be expected to make major and minor mistakes in judgment. Even Thomas Jefferson, who strongly believed that a free press is essential to a free society, complained about ". . . the putrid state into which our newspapers have passed and the malignity, the vulgarity, and mendacious spirit of those who write for them . . ."[1] He argued nonetheless that "our liberty depends on the freedom of the press, and that cannot be limited without being lost." Similarly, this inquiry into the functions performed by an imperfect press seeks to discover whether, on the whole, it has been the handmaiden of democracy that it purports to be and is believed to be.

The Press as a Market Place of Ideas

When Justice Oliver Wendell Holmes opined in 1919 "that the ultimate good desired is better reached by free trade in ideas—that the test of truth is the power

[1] Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge, Mass.: Harvard University Press, 1963), 67.

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of the thought to get itself accepted in the competition of the market," he expressed an axiom of American democratic theory.[2] Analysts of group behavior and decision making may wish to argue with this proposition, because there is much evidence that it is at least partially false. More diverse news may, in fact, stifle discussion by confusing the public and arousing cynicism about the possibility of assessing reality accurately. But this is not the place to ponder such arguments.

The framers of the First Amendment and most Americans today believe that free, open, and vigorous public discussion of ideas enhances the quality of democratic governance. As a unanimous Supreme Court ruled a half century after Holmes's opinion: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market."[3]

Two conditions are essential to assure news diversity: information must come from a large number of sources that make independent news selection decisions, and the corps of newspeople must be diverse to represent the diverse interests that make up America. These conditions existed in the early days of the republic when newspapers were personal or party organs and diversity stemmed naturally from the individuality of their editors or proprietors. By contrast, the marketplace in the twentieth century is far from being uninhibited, and the trend toward monopolization of ownership of news enterprises has been strong and is growing stronger and swifter.

First, a few facts about market concentrations: there are roughly 1,750 daily newspapers throughout the United States. Ninety-eight percent lack even nominal local competition, giving them a virtual newspaper monopoly in their locations. The only competition comes from other types of media, such as over-the-air and cable television, radio, and news magazines. In smaller towns, there often is some competition from metropolitan papers in the same region. In larger towns, suburban weeklies may offer alternative outlets. However, none of these alternative outlets amounts to genuine competition in the presentation of extensive local and national news.

The 1,750 daily newspapers published in the United States do not represent 1,750 independent voices. More than 65 percent, representing 73 percent of the total circulation nationwide, are now controlled by national and regional chains. Thirty-five years ago, in 1950, only 20 percent were chain-controlled, and they only represented 45 percent of the total circulation. Gannett currently operates the largest of these chains. It owns more than eighty newspapers, including *USA Today*, the first national daily paper. In addition, it controls numerous television stations, radio stations, an outdoor advertising business, and a sophisticated satellite information transmission system.

The ten largest chains purvey news to slightly over one-third of the newspaper audience throughout the nation. Chain-owned newspapers generally offer a fine

[2] *Abrams v. United States*, 250 U.S. 616 (1919) at 630.

[3] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) at 389–90.

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product because the chain has ample money. In fact, judged by journalistic criteria, chain-owned papers as a group outrank the quality of independent papers. But the breadth and polish of chain-owned papers does not compensate for the danger of concentrated control. With fewer gatekeepers deciding what news to present and what news to omit, newspaper offerings have become increasingly uniform throughout the country. The trend toward combining print and electronic media under one corporate roof has further homogenized news and diminished the number of people with access to the information marketplace.

In television, control is even more concentrated. The three major networks provide the bulk of programs for 550 stations that are affiliated with them throughout the country. Eighty-five percent of the potential U.S. television audience is exposed to programs created by the three major networks. Only ninety stations are totally unaffiliated. Each network also owns five stations, located in the most populous parts of the country. In combination, the fifteen network stations have an audience reach of 100 million people. The parent companies of the networks own other information-producing enterprises, such as recording companies, publishing houses, and movie theaters. The resources available to such large enterprises have made for more lavish programming than would otherwise be possible. Nonetheless, concentration of ownership means a restricted number of available viewpoints and perspectives.

Expectations that cable television would diversify the number of sources controlling the flow of televised information have not materialized. Much cable programming comes from existing networks or from new combinations. Better than half of all cable outlets are owned by organizations that control other information-producing enterprises. Only control over radio broadcasting has remained fairly dispersed. But radio is not a very major source of news for the public.

Wire service concentration compounds the danger of producing assembly-line standardized news. A huge share of the news stories appearing in print and electronic media throughout the country comes from the Associated Press (AP) and United Press International (UPI). Ninety-nine percent of the news sources in the United States with daily publication schedules are served by either AP or UPI or both. Far fewer publications are served by additional wire services, operated by major newspapers like the *New York Times*, the *Los Angeles Times*, or the *Chicago Tribune*. In smaller news enterprises, up to 80 percent of the stories may originate from wire service news.

The news magazine business is also dominated by three giants, each with a huge audience with above average interest in politics and above average influence on public policy. *Time* magazine reaches four million households, *Newsweek* three million, and *U.S. News and World Report* two million. The influence of the owners of these magazines has been enhanced by the fact that *Newsweek* is owned by the influential *Washington Post*, and *Time* magazine was connected to the rival *Washington Star* until the *Star's* demise in 1981.

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If present trends continue, ten huge corporations will own nearly every daily paper in the United States before the turn of the century. These corporations will not generally compete with each other for the consumer's favor. In most cases, they will enjoy local market monopolies. Fewer than ten corporate giants will dominate the production and airing of the television programs on which the public relies for news and entertainment. Most independents and unaffiliated smaller combinations will buy a substantial share of their programming from these giants.

Media concentrations have not yet reached the point where antitrust regulations could be used to stop them. These regulations become operative only when the eight largest firms in a particular type of business control more than 50 percent of the market and the twenty largest firms control 75 percent or more of the market. The deregulation policies implemented during the Reagan administration have made it even easier to combine media enterprises. For instance, the number of AM radio stations, FM radio stations, and television stations that may be acquired by a media group has been increased from seven of each, or a total of twenty-one, to twelve of each or a total of thirty-six, as long as this does not amount to control of more than 25 percent of the national audience. Limitations have also been removed on the number of radio and television stations that a group may control in a particular media market.

Most troublesome of all, the high profitability of media enterprises and the steep prices paid for them have made them popular targets for take-overs in the mid-1980s. Increasingly, media properties are attracting corporations and professional speculators who are far more interested in reaping investment returns than in information production. Anybody with big money can get into the game. The scramble for stations, encouraged by the new 12-12-12 rule, has assured that the stakes rise even higher. Stations that once sold for ten times cash flow are now commanding forty times cash flow prices. The main interest of many of the new breed of owners is the bottom line on the financial accounts.

Even the largest media enterprises are not immune from take-overs. That became clear in 1985 when the ABC network was bought by another media company, Capital Cities Communications, for $3.5 billion dollars. Shortly thereafter, conservative Republican Senator Jesse Helms and a conservative media watchdog group called "Fairness in Media," along with Ted Turner, the cable-network television tycoon, threatened to orchestrate a take-over of CBS to remove it from control that conservatives deemed too liberal. Acquisition fever has also increased in the newspaper and magazine fields but not as much as in television.

Concentrated ownership stifles the uninhibited expression of ideas in several ways. It makes it almost impossible for small entrepreneurs to enter or remain in the media business, because they cannot attract or retain enough advertising. The costs of print and electronic mass communication enterprises are paid largely by advertising revenues, *not* by the subscription price, if any, paid by media consumers. Advertisers generally prefer media that can reach large numbers of potential customers. Advertising rates escalate corresponding to the

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market reach of a particular news source. Newspaper competition in most American cities has been a casualty of the wars over advertising accounts. Once one newspaper has captured a substantially larger share of the audience, advertisers shift their business to it, leaving the trailing newspaper without sufficient income to remain in business. Bigger thus means stronger, and smaller means weaker. The small entrepreneur has little chance of entering or surviving in an environment dominated by business giants.

When it becomes well-nigh impossible to start one's own media enterprise on anything but the smallest local scale, dissenting voices depend on the willingness of the existing media to publicize their concerns. Except for a very limited degree of access by right in the electronic media, Supreme Court interpretations of the First Amendment have made it quite clear that an individual has no right to demand access to the media. As Chief Justice Warren Burger said in the majority opinion in *Columbia Broadcasting System v. Democratic National Committee*, "To agree that debate on public issues should be 'robust and wide open' does not mean that we should exchange public trustee broadcasting, with all its limitations, for a system of self-appointed editorial commentators."[4] In the Court's view, "no private individual or group has a right to command the use of broadcast facilities."[5] Rulings have been similar for cable television and for the print media field.[6] Neither print nor electronic media are viewed as common carriers open to the messages of all citizens. In the print media, even the rights of public officials or candidates for office to rebut libelous attacks are left without protection.

The media have not usually been generous with granting access to the many viewpoints that have clamored for attention. In fact, Jerome Barron, a champion of citizens' right to access to the media, has complained that " . . . increasingly, private censorship serves to suppress ideas as thoroughly and as rigidly as the worst government censor."[7] That probably overstates the case, because government powers of suppression are potentially far greater than the powers of media barons who still lack complete monopoly control over the market place of ideas. Nonetheless, the complaint carries more than a grain of truth.

Denial of access generally has not been motivated by hostility to conflicting viewpoints or a desire to retain editorial control. Rather, size by itself and the shortage of print space and air time have made it difficult for the media to comply with demands for access. The larger the enterprise, the greater the pressure to be bland and avoid anything that might be offensive to some members of the large media audience. To keep the majority of their customers pleased and

[4] *Columbia Broadcasting v. Democratic National Committee*, 412 U.S. 94 (1973) at 125.

[5] Ibid., 113.

[6] The leading cases are *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974) and *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689 (1979).

[7] Jerome Barron, *Freedom of the Press for Whom? The Right of Access to the Media* (Bloomington: Indiana University Press, 1973), 321.

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loyal, most media gatekeepers believe that they cannot afford to present a lot of information that is likely to bore or offend their clients.

The need to serve huge, heterogeneous audiences restrains news diversity in yet another way. It fosters what has been called "pack journalism." Like a pack of wolves, reporters go after the same news targets and use the same news interpretations whenever stories promise to have mass appeal. Elite newspapers are the acknowledged leaders of the pack. Thanks to pack journalism, the news product has become unduly homogenized throughout the country. On any given day, newspapers, radio, and television outlets tend to select quite similar news menus from the large array of available stories. Pack journalism becomes particularly harmful when there are sensational news stories that attract detailed coverage by all the media, while important major stories happening simultaneously remain unreported.

When news is excessively homogeneous because it comes from a limited number of sources, wide-ranging discussion withers. When a few major networks control the news, consensus is already near completion at the start and rests on a constricted information base. It should be reached only after weighing a broad array of options presented from diverse perspectives. When news treatment is uniform, biases and errors, which are endemic to news production, may cause major disasters because they are disseminated to millions of people.

Early coverage of the Vietnam War is a tragic example. American media, relying on the same limited number of sources, presented similar scenarios, based on shared but untested assumptions. They characterized the war as a struggle between the non-communist world and expanding communist powers that threatened American security. They prophesied that non-communist nations would fall like dominoes if Vietnam succumbed. This definition of the situation, also shared by Congress and the executive branch, made American intervention a foregone conclusion. It militated against questioning assumptions and discussing other options. It thus greatly impoverished the decision-making process.

The Press as Political Information Source

James Madison wrote in 1822: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[8] Such sentiments still represent American political folk wisdom.

In today's world, when most political problems facing governmental officials

[8] Letter from James Madison to W.T. Barry, 4 August 1822, written to support a Kentucky bill to fund public education. Gaillard Hunt, ed., *The Writings of James Madison*, vol. 9 (New York: Putnam, 1906–1910), 103.

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occur beyond the realm of personal experience, it seems particularly important to provide citizens with reliable sources of information about the major public issues of the day. Lack of adequate information can lead to serious political difficulties. For instance, the media's failure to report race relations and ghetto problems adequately may have been a major factor leading to the urban riots of the late 1960s. That was the conclusion reached by the National Advisory Commission on Civil Disorders, chaired by former Illinois Governor Otto Kerner, which investigated the causes of the disturbances. Ever since the political upheavals of that period, there has been much talk about a constitutionally-mandated right to know. Chief Justice Burger referred to it in a 1973 case as "the right of the public to be informed."[9]

The public's right to know has also been acknowledged in an impressive amount of legislation designed to insure governmental openness and accountability. Foremost is the Freedom of Information Act of 1966, as amended in 1974, which is the legislative basis of the right to access to government files at the federal level. The precise scope of the right to obtain information is still in the process of definition because court decisions have made it clear that it does not mean that every citizen has the right to know everything.[10] Obviously, the broad range of the abstract right is limited by competing legal, moral, and political considerations. While the extent of the public's right to know has received a good deal of scrutiny, the obligations of the press in exercising the right on behalf of the public have rarely been examined.

The media acknowledge their special role in providing information. They have claimed constitutionally-mandated special access privileges to government information and facilities on the grounds that they are the most likely purveyors of information needed by citizens to perform their civic duties. Supreme Court majorities have denied special access rights, but the concept has received support from eminent dissenters. Justice William O. Douglas, for example, in *Branzburg v. Hayes*, argued that the "press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."[11]

How well has the press performed the information supply function which it claims as its special, highly important mandate? Judging from investigations of the substance and quality of political information supply, particularly during major election campaigns, the answer is "not very well."

Thomas Patterson, in a recent assessment of the media's performance in furnishing election information to the public, concluded that the media generally fail to supply three types of facts that are essential for making intelligent election

[9] *Columbia Broadcasting System v. Democratic National Committee*, at 113.

[10] See *Gannett v. DePasquale*, 443 U.S. 368 (1979).

[11] *Branzburg v. Hayes*, 408 U.S. 665 (1971) at 721.

[12] Thomas Patterson, "The News Media's Capacity as Electoral Intermediary," 1985 American Political Science Association paper.

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choices.[12] Patterson calls them "consequential facts," "patterned facts," and "conditional facts." Consequential facts convey information about the likely consequences of various types of political decisions. While newspeople often speculate about future events, they rarely interpret for their audiences what impact these events are likely to have on the body politic. For example, during presidential primary elections the media devote a large share of their attention to the horse race aspects of the contest. The capabilities of the various contenders are generally not discussed until it is too late to use this information for voting decisions. By concentrating on the electoral fortunes of the front-runners, the press deprives the public of timely information that would enhance the possibility for making rational voting choices from the entire array of initial candidates.

The press also slights patterned facts. These would alert citizens to historical patterns, thereby giving perspective to their deliberations. Unlike the candidates, who stress recurrent patterns in societal problems and the solutions offered for these problems by their predecessors and rivals, newspeople approach politics and history as if it were a series of discrete events. They emphasize novel twists, regardless of significance, at the expense of pointing to long-range continuities. Lengthy, analytical pieces are rare. Large proportions of available time and space are spent on juicy items. Examples from the 1984 presidential campaign include a massive number of stories about Geraldine Ferraro's tax returns, Jesse Jackson's tactless language about Jews, and Ronald Reagan's slips of the tongue. Meanwhile, the candidates' major policy programs are slighted. A major foreign policy speech by presidential contender Walter Mondale went virtually unreported when the news was filled with blow-by-blow accounts of the release of an American navy lieutenant from captivity in Syria.

Similarly, the press shuns conditional facts, which are facts that hold true only under certain conditions, because newspeople find it difficult to explain under what conditions these facts enter the picture. Besides, unconditional statements are more interesting and dramatic than conditional ones. When candidates hedge or when their stands change in line with conditions, the media prefer to talk about broken promises, deliberate manipulations, and the like, rather than the ambiguity of situations. Once journalistic characterizations have been established, the media are loathe to change them, even when the original appraisals were overly hasty or when conditions have changed the situation. The stereotypical political images purveyed by the media, especially television, leave citizens either misinformed or force them to attempt their own calculations about political realities. The lack of adequate media information may make it impossible to make such calculations accurately.

Patterson's complaints about election information are echoed by political leaders as well as academic researchers for election news as well as political news in general. There are complaints about the quantity and quality of serious political information and about the limited scope of topics covered regularly. The media have been accused of skewing social and political reality by emphasizing the unusual without providing the necessary context for accurate appraisals of

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the information. Critics charge that crises and dramatic and sensational events have been stressed, rather than socially significant occurrences and trends.

Marxist media critics go even further and claim that the ruling capitalist classes control the media and use them deliberately to perpetuate capitalist ideology. They view media products as "messages in code about the nature of society, the nature of productive relations within the media themselves and institutional domains and social processes."[13] Many media analysts dispute this claim, but few deny that the product offered to the public by the media is seriously flawed when judged in light of citizens' information needs. Walter Berns, in the preface to his 1970 book on *The First Amendment and the Future of American Democracy* warned that "the foundation on which liberty rests is endangered by the character of what is being communicated and what is not being communicated."[14]

Television, the most widely used medium for political news, has been faulted most of all. It has been called a mere headline service, a wasteland, a trivializer, a sensationalizer, a threat to the American way of life, and worse. It devotes more time to coverage of sports and weather news than to most political issues, including everyday concerns such as public education, housing, and social welfare policies. The verdict among media scholars is that the press, especially television, falls far short of offering the kind of information supply that would assure a knowledgeable public.

The blame for this state of affair rests partly on the media and partly on media audiences. Americans may chide their news suppliers for shallow coverage and for pandering to people's tastes for the excitement that comes from vicarious experiences with crime, disaster, and sexual exploits. But most Americans consume this sort of fare in preference to the kinds of in-depth political analyses occasionally presented in newspaper features or television documentaries. Public television's effort in the nightly McNeil-Lehrer reports to provide news coverage in greater depth and perspective has not won a wide following, even among people familiar with the program. Knowing that the kinds of mass audiences that the giant media require will not bother with serious political discussions, the media give the public what it appears to want—mostly froth and little substance.

Of course, fixing blame is not the point of this assessment. The main point is that the public information function, deemed so crucial in a democracy, is poorly performed. News selection criteria relate more to audience appeal than to the political significance of stories or their relevance to civic goals. Newspeople clamor for access privileges to meet their obligation to keep the public well informed. Yet they fail to fulfill this obligation. If democracy does, indeed, depend on a well-informed citizenry—again an arguable proposition—then American democracy has not been well served by the media.

[13] David L. Altheide, "Media Hegemony: A Failure of Perspective," *Public Opinion Quarterly* 48 (Summer 1984):478.

[14] Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1970), x.

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The Press as the Voice of Public Opinion

If the press were an effective channel of communication through which the public kept in touch with other citizens and government officials, several conditions would have to be met. The press would have to keep in constant contact with various publics so that it could assess and report the nature of major public concerns and the state of public opinion. It would have to provide information related to these concerns on a regular basis to assist with the public debate, and it would have to publicize the public consensus routinely for the benefit of average citizens and political elites.

Nothing of the sort has happened or is likely to happen on the American political scene. Except for occasional interviewing ventures, the press does not seek out average Americans to report their concerns and opinions. The press seeks out political elites and reports their views. Media beats are structured to cover major public-sector and some private-sector institutions. They are not structured to take the pulse of public sentiments regularly and on a wide array of issues.

Newspeople often claim that they speak on behalf of the public's interests. But they deny vehemently that this constitutes an agency or fiduciary relationship in which the client public has any right to dictate media action or to hold the media accountable. The courts concur that media freedom includes freedom from control by the public, along with freedom from many governmental controls.

There is not even an informal agency or fiduciary relationship in which media pleadings about politics take their cues from the public's wishes. The realm of news concerning national security matters is a good example of media following their own inclinations, even when these contravene public wishes. Normally, the press is heedful of considerations of national security when it publishes potentially sensitive news. But on numerous occasions, such as the publication of the Pentagon papers, the media have insisted that information ought to be published, although elected officials thought that publication might damage national security. Large sections of the public, on the other hand, believe that there should be extraordinary sensitivity to national security considerations. They prefer media silence to risking the nation's safety. In a 1984 national survey, 70 percent of the respondents said that documents should not be published "if there is any doubt about violating national security."[15]

Recent public opinion polls also indicate that large numbers of people disagree with the media's general approach to news. A 1984 survey commissioned by the American Society for Newspaper editors found that 50 percent of the respondents believed newspapers are not usually fair and do not usually make strenuous attempts to present opposing viewpoints about a story. Sixty-three percent of the respondents expressed such qualms about television.[16] Similarly, news audiences felt dissatisfied with the balance of negative and positive news presented to them. A 1983 ABC News/*Washington Post* survey disclosed that 73

[15] David R. Gergen, "The Message to the Media," 7 *Public Opinion*, (April/May, 1984):8.
[16] Ibid., 6.

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percent of the respondents thought that television news concentrates too much on bad news and not enough on good news.[17] Careful analysis of this type of response indicates that most people meant more than disturbing events by "bad news." They were also referring to their dislike of hype, sensationalism, and faulty news judgments.

While the press-public liaison is not what it is assumed to be, there are nonetheless close ties between the press and public opinions. As supplier of most of the information about public affairs received by the public, the press provides the raw material from which public opinions are shaped. News stories also create the symbolic environment in which news events are evaluated. When, for example, media coverage indicates respect for the established order, as most of it does, this tends to legitimate the status quo in the minds of audiences and retard the growth of opposing opinions. Through their choice of news stories and through the perspectives from which these stories are presented, the media thus create the framework that sets the boundaries for political discourse and the action that often flows from it.

Despite much scholarly evidence that the media are powerful, though not omnipotent, in shaping public opinions, newspeople generally disclaim any responsibility for the impact they have on the public dialogue. In fact they are prone to deny that impact. Yet it would be difficult, for example, to argue convincingly that heavy media emphasis in 1985 on news about race relations in South Africa was not responsible for the emergence of strong public opinions about a long-standing political problem that had hitherto been only vaguely familiar to most Americans. Without such extensive coverage, it is unlikely that American public opinions would have crystallized to the point of generating sufficient political pressure to consider intervention into South Africa's racial tragedy. Considering the media's potential influence on public opinion and public policy, one may question the ethics and even the legitimacy of the media's complete rejection of responsibility for the impact of editorial decisions. One may wonder whether editorial considerations about publicizing or ignoring significant news ought not, at the very least, weigh the public consequences of news choices.

Of course, the notion of media as a major catalyst and contributor to the formation of mass opinion has, for the most part, remained a hallowed yet hollow myth. On most issues, average people do not form their own opinions even when suitable facts are available from the media. Political elites are the chief opinion makers and the main users of media news supply. Elites, as the term is used here, include pressure groups, publics who are keenly attentive to selected issues, and political dissidents who oppose prevailing political ideologies. These elites pay careful attention to aspects of politics that interest them and engage in serious discussions so that group consensus can be reached. The impact of media information supply on the opinions held by average citizens comes largely through media information about elite opinions.

[17] Ibid., 7.

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For most issues, most people belong to non-elites. The opinions that they express to pollsters and that the media publicize are pseudo-opinions. They do not deserve the public opinion label because they are not based on consensus reached through careful deliberation and broad discussion. Pseudo-opinions rest on superficial snap judgments, blanket projection of past judgments to current conditions, or on opinions gleaned from views of opinion leaders publicized by the news media. Not surprisingly, such poorly grounded opinions tend to be fleeting and unstable, shifting readily as the situational context surrounding their expression changes. When the media report these pseudo-opinions as if they were genuine public opinions, they mislead their audiences, albeit usually unintentionally.

One other connection between media fare and public opinions needs to be stressed. Even though the news media do not generally reflect public opinions, and even though most poll results reported as public opinion are merely pseudo-opinions, the thrust of news stories and opinion polls is often taken as the expression of public opinion. This holds true for public officials at home and abroad who often equate the media's voice with the public's voice. It also holds true for media audiences who think that widely-publicized views are apt to be prevailing views, especially when political leaders claim that they are. In turn, such misconceptions may have opinion-shaping effects. People may adopt, or acquiesce to, prevailing opinions merely because they consider them to be majority views.

The Press as Guardians of Minority Rights

In part, the First Amendment was designed to restrain the public from oppressing dissidents, as well as protecting the public's own freedom of thought and expression. As Walter Berns has pointed out: "As we know from the *Federalist*, and especially from the 10th and 51st *Federalists*, the men who wrote the Constitution were concerned to inhibit the power of the people, who would rule by right but would misrule by inclination unless somehow prevented from doing so."[18] The anticipated misrule was suppression of minority views by hostile majorities. Freedom of speech and of the press were viewed as ways to prevent such suppression. What has the press done to carry out this trust?

Unlike the courts, which have been a countermajoritarian force in our system, the media have failed to be steady champions of minority rights. While the media assert their freedom from public opinion when it comes to the media's rights to speak freely, they have not generally fought very hard to maintain this right for the actual and potential victims of suppression. John Lofton, who studied this phase of performance by major newspapers throughout American history, came to the conclusion that "except when their own freedom was discernibly at stake, established general circulation newspapers have tended to go

[18] Berns, *The First Amendment*, 230.

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along with efforts to suppress deviations from the prevailing political and social orthodoxies of their time and place rather than to support the right to dissent."[19]

As examples, Lofton cites media silence or support for the many instances when sedition and treason laws were used to suppress prewar and wartime dissent, beginning with the early presidencies when the sponsors of the First Amendment were still the helmsmen of the nation. Neither did the press plead for the rights of people under attack for championing unpopular ideologies, such as socialism, communism, or radical forms of labor unionism. Only when its own ox was being gored did the press champion the First Amendment. According to Lofton,

> . . . the press generally commended Supreme Court decisions invalidating a Minnesota press gag law and a Louisiana tax on newspaper advertising (*Near v. Minnesota* and *Grosjean v. American Press Co.*), decisions curbing the contempt power of judges (*Bridges v. California, Pennecamp v. Florida* and *Craig v. Harney*), a decision limiting the libel accountability of the press (*New York Times v. Sullivan*), a ruling checking the authority of public officials to penalize election-day editorializing (*Mills v. Alabama*), and a decision denying the government power to prevent publication of the questionably classified Pentagon papers (*New York Times v. United States*).[20]

The Press as Policeman for Errant Politicians

A few spectacular cases spring immediately to mind when one ponders the role of the press as policeman for errant politicians: Watergate, the Mylai massacre, CIA and FBI excesses, and a bevy of corrupt politicians and administrators whose misdeeds were exposed through the media. That is well and good. The media have occasionally performed the watchdog function very well indeed.

But one must emphasize the qualification "occasionally." While investigative journalism has ebbed and flowed in popularity, there has never been a time when the media routinely and systematically checked the activities of politicians. Scrutinizing the records of prominent candidates for office is the closest they have come. Otherwise, with few exceptions, newspeople wait to be tipped off by insiders before delving into questionable political activities. The leaks or requests for media publicity have been haphazard. They have come mostly from disgruntled officials or officials anxious to generate public opinion pressures for a particular policy.

Newspeople have pushed ahead with stories only under two conditions: when the factual situation was relatively clear so that extensive probing, costly in time, effort, and loss of valuable news sources was unnecessary; and when the story promised to be enthralling to media audiences. Neither the public's need to know the facts nor concerns about institutional failures have been major criteria for

[19] John Lofton, *The Press as Guardian of the First Amendment* (Columbia: University of South Carolina Press, 1981), 279. Lofton checked elite papers such as the *New York Times, Washington Post, St. Louis Post Dispatch, San Francisco Chronicle, New Orleans Time Picayune, Denver Post, Pittsburgh Post-Gazette, Louisville Courier Journal,* and *Christian Science Monitor.*

[20] Ibid., 282.

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pursuing an investigative story. Rather, the main criterion has been the desire to produce exciting, popular stories. Unfortunately, public service objectives and journalistic objectives coincide only occasionally. The most damaging acts of public malfeasance do not necessarily make the best stories.

Close examination of several recent instances of press sleuthing with widely heralded payoffs indicates that the media often deserve less credit than previously believed for detecting public wrongdoing and fostering corrections. In the Watergate situation, for example, the press, with few exceptions, did not really put its muscle behind the investigation of executive branch misdeeds until the presidential election campaign was over. Only when the story could no longer be disparaged as normal election propaganda, but could be featured as an issue of pervasive corruption and dishonesty at the highest levels of government, did the media pick it up en masse.

In the end, as Gladys and Kurt Lang have concluded from their extensive study of the Watergate situation:

> Based on the evidence, we reject the paranoid version of Watergate propagated by the White House that the crisis was manufactured by a hostile press which finally drove Nixon from office. But we also reject the populist view that Nixon was forced to resign because he lost his battle for public opinion. The moving force behind the effort to get to the bottom of Watergate came neither from the media nor public opinion but from political insiders. The conflict pitted the White House against those who, for whatever reason, wanted full disclosure of the facts behind the illegal attempt to plant wiretaps in the national headquarters of the Democratic party.[21]

The Bottom Line of the Balance Sheet

When an institution whose functions seem so essential to the public interest performs these functions far less than anticipated, one ought to look at the reasons, assess the consequences, and determine the public implications. There are numerous reasons why media performance deviates from expectations. Foremost among them is the fact that the media were not designed to perform the functions allotted to them by democratic theory. To provide an open market place for disseminating diverse information, for example, would require a vast array of small media enterprises, including some common carriers whose facilities would be open to all who desire to be heard. Whether such a system would be feasible, and to what degree it would assure a dialogue or even an audience for this multiplicity of voices, are moot questions. Judging from early experiences with public access television, the answer is probably negative. No matter. The fact remains that no institutional arrangements have been made to make the mandate feasible. Neither were the media designed to be a public information service, a monitor and publicizer of public opinions, a guardian of the liberties of dissenters, or even a watchdog over government.

[21] Gladys and Kurt Lang, *The Battle for Public Opinion: The President, The Press and the Polls during Watergate* (New York: Columbia University Press, 1983), 301.

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The media were designed, or rather, have grown to be, a haphazard performer of public service functions and a major source of public entertainment and advice about everyday living and business concerns. The media developed in this manner primarily because most were organized as self-sustaining private enterprises dependent for survival on earning sufficient money to pay for the costs of the enterprise. As private business in capitalist society, the media's primary mission is to please their clients in order to enhance profits. When economies of scale became essential because of rising operating costs, smaller units were forced to join large combinations to avoid financial ruin. The performance of democratic services thus, of necessity, is a secondary goal that must be trimmed and shaped so that it fits into the money-making structure.

The surprising thing is not that the media have failed to meet the expectations suggested by the early myths. The surprising thing is that they have continued to perform many public service functions as well as they have. At times, as in investigative reporting, profit motives have spurred concerns for the public's welfare. But there have also been many instances when public service has strained media resources but has been carried on nonetheless because the business was otherwise profitable.

There are other reasons for slighting the service functions, such as citizen disinterest in the public dialogue, lack of cooperation by public officials, and occupational pressures to cope with massive amounts of news and to report stories rapidly. But the crux of the problem lies in the basic structure of American media, which is not conducive to excellent performance of public service functions. There is no likelihood that that structure will change and, thus far, no satisfactory alternatives have even come into sight.

Before suggesting how public service functions might be improved within the current structural arrangements, it is helpful to ask how American democracy has managed to survive for 200 years without media designed and dedicated to public service functions deemed essential for democratic governance. The answer seems to be that, insofar as democratic objectives have not been met, American democracy has remained limited and imperfect. However, the shortcomings of the general circulation media have been made up in part by auxillary media and by other institutions in society whenever these shortcomings were acutely felt. The role of the courts has already been mentioned as champions of the rights of dissenters.

During the 1960s and at other times in American history, when the market place of information was closed to voices clamoring to be heard, underground media were created to provide outlets. Through ingenuity and much unpaid labor, they managed to overcome the barriers of lack of money and lack of technical expertise to get their messages to at least a limited number of people. Publishing in these media was obviously not as effective in terms of audience reach as time on national television would have been. But it showed that ways can be found to satisfy democratic needs, at least partially, when these needs are strongly felt.

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The suggestions for reform offered here are modest and intended only to show that reforms to improve the problems discussed here are entirely feasible. They are presented in light of the reality that profit concerns must be near the top in private enterprise media businesses. But they also take account of the fact that private enterprises in democratic societies have ethical responsibilities so that the conduct of their business does not do major harm to public interests. Neither the media, nor other enterprises, should be allowed to claim freedom from responsibility for harm to the general welfare resulting from their operations on the grounds that the impact on society was not intended or even considered.

Media enterprises occupy a unique position in American society. Their performance is more closely intertwined with the general welfare than holds true for most other institutions. In recognition of the essential role they play in a democratic society, they are the beneficiaries of unique constitutional protections. Moreover, the courts have usually been quite generous in putting broad interpretations on the scope of these protections. The media, therefore, owe greater obligations to the public than the merchants of more ordinary consumer goods and services.

To encourage greater diversity in the media marketplace, the definitions for what constitutes monopoly control might be made more rigorous for the media than for other businesses. A limit might be placed on audience reach so that media combinations serving many millions of citizens would run afoul of the law. The revised laws might be applied to all the media: print, television, radio, and the wire services. Radio and television stations might also be required to sell air time in blocks with limits on how much time any organization can buy.

To enlarge the marketplace of ideas, the op-ed pages of newspapers and the letter columns might be expanded substantially to make more room for dissent. Lofton has proposed that a page per week or month might be given to dissident groups who demonstrate that their views have not been able to reach media audiences.[22] Restrictions on the substance of their messages would be limited to avoidance of outright libel and stories grossly offensive to public tastes. The general circulation press might also reprint material from offbeat sources more regularly than is now customary.

Advertising space should be open to all comers without editorial restrictions. Space should be available on a first-come first-served basis and rates should be nondiscriminatory. If media gatekeepers feared that a proposed message might do serious harm, they could seek a court injunction. In any case, the sponsors of the advertisement, rather than the media, should be held responsible for the content of their messages.

When Fred Friendly resigned as president of CBS News in 1966, it was rumored that the reason was network refusal to cancel a rerun of the "I Love Lucy" show and instead provide live coveage of crucial hearings on the Vietnam war. Friendly reputedly was told that shareholders would not tolerate the decrease in

[22] Lofton, *The Press as Guardian*, 290.

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profits that would come from the switch. Such slavish pursuit of profit concerns when major public issues need widespread dissemination could certainly be avoided. Similarly, pack journalism can be eliminated if newspeople are willing. Rather than copying each other, journalists could check what the competition is doing so that they could then avoid unnecessary duplication. They could also opt for greater depth of coverage in preference to pursuing trivial stories merely because they are new or exciting.

One type of remedy that should be avoided is more extensive government regulation of the media. American experience with regulating the electronic media with an eye to serving "the public interest, convenience, and necessity" indicates that government regulation does not solve the problems discussed in this article. The regulatory mandate carried out by the Federal Communications Commission for more than half a century has not led to better performance of public service functions. Television does no better than the unregulated print media; in many respects, it does worse. Unfortunately, society has not yet devised an effective control or guidance mechanism that does not rob the press of needed freedoms.

Finally, the crucial question: Are the American people paying too much for their whistle when the price of press freedom is considered in terms of its costs in other rights and when the media have delivered only a small number of the services that were an implicit part of the bargain? The answer can be phrased in two cliches: Half a loaf is better than none, and experience is a great teacher. The media are performing the functions attributed to them at least in part. In so far as First Amendment protections assure the continuance and possibly the improvement of these important services, the price paid is within reason.

On the other hand, experience with media performance should be used to weigh the degree to which some privileges granted to the media are excessively costly or unnecessary for the functions that American media actually perform. William Van Alstyne, Perkins Professor of Law at Duke University, has raised a number of cost-benefit issues. He contends that the public's interests have suffered unduly because of privileges granted to the press.

> It is as though the rule of the first amendment harbored (in "the press" clause) the following propositions:
> 1. The greater the circulation of a libel (e.g., by newspaper rather than by word-of-mouth), the more immune is the libeler.
> 2. The greater the danger of irreparable harm (e.g., by newspaper publication of material prejudicial to a fair trial), the more absolute the protection of the source from injunction.
> 3. The greater the incentive for reporting fiction as fact . . . , the greater protection one has from devices of civil discovery."[23]

The current system has weakened the public's protection from libel, false in-

[23] William W. Van Alstyne, *Interpretations of the First Amendment* (Durham, N.C.: Duke University Press, 1984), 62–63.

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formation, and irresponsible private censorship. Van Alstyne contends that one might argue, in the spirit of the First Amendment, that the press should have lesser rights than private individuals to withhold information about its sources because the public needs to judge the credibility of a story. The press should have greater liability than others for damaging and false reports so that the measure of redress matches the magnitude of harm, and it should have less protection from prepublication restraints so that irreparable harm can be avoided. As long as the press claims to represent the public, it should have less editorial autonomy to deny access to the media to average citizens. Others have suggested that citizens deserve a constitutionally protected right of reply when they have been attacked in the media. Lest it be feared that reining in the press somewhat would destroy its freedom, it is worth mentioning that the British have maintained press freedom and a vigorous democracy despite stricter libel laws, more restraints on editorial freedom, and despite the existence of quasi-governmental press councils that monitor and criticize press activities.

Complaints have also been directed at the fact that the press enjoys its great powers without corresponding responsibility or accountability for the consequences of its actions. In a society that believes in checks and balances, the uses and abuses of such unchecked power have become a major cause for concern. This concern is heightened by the fact that the long-term trend has been toward ever greater press power and ever broader press freedom. How to hold the press accountable for irresponsible behavior that endangers public and private welfare without destroying the independence of the press has remained a problem without a solution.

As we enter the third century of government under the Constitution, we need to take stock of what all its provisions have accomplished for American democracy and what they have failed to accomplish. This article has attempted to make such an appraisal of the benefits reaped from the protected status accorded to the American press. The findings may be unpalatable because they do not conform to American political myths. Nonetheless, such appraisals are essential. The quality of American democracy is bound to suffer unless Americans are willing to explode myths that are found wanting and willing to adjust their institutions in light of current political realities.

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Contemporary Judicial Processes and a Democratic Society

HENRY J. ABRAHAM

To be faithful to the Constitution's mandate to "promote the general welfare," any judicial system or structure in a democratic society with a constitutional base must essentially meet two basic requirements of public policy: namely, to protect society and to be fair to those accused of infractions of the society's fundamental law. These two are of course not incompatible; but they demand the kind of line-drawing and/or "balancing" of which philosophical as well as pragmatic concepts of democratic government and politics are fashioned.

Whatever the particular success or failure of specific judicial systems to draw these vital and often so vexatious lines may be in the eyes of knowledgeable students of courts and the human beings who comprise them, there is always room for improvement. Suggestions abound. In general, they fall into three broad, interrelated categories: those dealing with the institution and *modus operandus* of the courts themselves; those dealing with the legal framework mandated by a society's lawmakers and its constitutional constellation; and those concerned with the individuals who act upon and staff the courts. All three categories presumably are dedicated to the fundamental goals of any free, democratic judicial system, which—as widely stated and accepted—are those of: peaceful resolution of private civil conflicts; enforcement of criminal laws; safety valve for the amelioration of "repressive laws"; efficient operation; and restraint upon governmental intrustions—both in the realm of individual rights and in that of the separation of powers.

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It is in the last category in which judicial review, the ultimate power of a judiciary, assumes its seminal role, one that attains its pinnacle of majesty *cum* controversy in the thin line it must tread between judicial "judging" and judicial "legislating" in order to avoid prescriptive policy making.

The judicial process comprises the work of courts and judges in our constitutional constellation. The process is, or at least ought to be, informed by both legitimacy *and* capacity. Yet both facets are provoking increasing controversy and concern on the part of both laymen and professionals. Basic to that enduring phenomenon is a rather general recognition, if not always duly articulated, that Alexander Hamilton was wrong when he pronounced the judiciary "the least dangerous branch."[1] To be sure, like the Pope, the judiciary possesses no armies, and its sole power is the power to persuade; and again paraphrasing Hamilton, "purse and sword are in other hands." The legislature controls the former, the executive the latter. Yet, while they are hardly infallible, courts and those human beings who comprise them are, in effect, final. As that supreme stylist on the Supreme Court, Robert H. Jackson once put it so pointedly: "We are not final because we are infallible, but we are infallible only because we are final."[2] If not in political theory, in practice courts *do* have the last word in statutory construction and constitutional interpretation. They make policy; they make law; and they do so at the trial level as well as at the appellate level. While it was and is an oversimplification, Charles Evans Hughes was essentially realistic when in 1907, as governor of New York, he declared, "We are under a Constitution, but the Constitution is what the judges say it is. . . ."[3] Of course, rulings, even those of the Supreme Court of the United States, can be, and indeed have been, sporadically overturned; but that result is as difficult to attain as it is uncommon. Nonetheless, the judiciary, in general, and the Supreme Court, in particular, have consistently, and rather deservedly, enjoyed a higher degree of popular approbation than have the politically elected branches of the government. For, by and large, America's citizenry have always rested more comfortably in the knowledge of a *judicial* guardianship of our fundamental civil rights and liberties rather than either a legislative or executive one, as is essentially the case in the United Kingdom.

Yet, criticism of the judicial process has been mounting dramatically, for several basic reasons. First, the huge and still mounting caseload is straining the justice system to the point where, in the often-repeated words of Chief Justice Warren Burger, it "may literally break down before the end of this century." Second, both parent and child of the first, is the often lawyer-stimulated litigation explosion and its consequences, coupled with the issue of jurisdiction exercised by and assigned to the courts. Third is the very nature of the adversary pro-

[1] See Alexander Hamilton, *The Federalist Papers*, Nos. 78–83, especially the first of these six famed analyses of judicial power.

[2] *Brown v. Allen*, 344 U.S. 443 (1950), at 540, concurring opinion.

[3] Charles Evans Hughes, *Addresses*, 2d ed. (New York: Putnam, 1916), 185.

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cess, in both substantive and procedural terms. And fourth, again quite naturally intertwined with the other three, is the penchant of all too many jurists—for the past decade, especially lower or trial and intermediate appellate court judges—to go beyond the presumed parameters of the judicial role by failing to defer sufficiently to the two political branches, especially the legislature. Judges do this by engaging in far too much *pre*scriptive policy making rather than in adhering to *pro*scription or validation. They sporadically "play God" and engage in excessive "do-gooding," thus ignoring the sage exhortation by the second Justice John Marshall Harlan—that our "Constitution is not a panacea for every blot upon the public welfare; nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements."[4]

Clogged Tribunals

The litigation explosion has reached proportions that are little short of scandalous. In 1983–84, a total of 642,605 law suits were filed in the ninety-four federal district courts. The combined total for all federal, state, and local courts was 25,000,000.[5] Even Alexis de Tocqueville, an acute and prescient student of the fledgling American democracy of the first half of the nineteenth century, would be amazed by how astonishingly accurate his prognosis that every public issue raised in this country would sooner or later turn into a judicial one would prove to be. He would hardly believe his sharp eyes and ears in the face of such suits as: a son's against his parents for $100,000 for "faulty parenting"; a prison inmate's suit against Iowa (in federal court) for the right to wear adult diapers; a Cincinnati citizen's alleged First Amendment right to drive his pet tank through its busy streets; a Wisconsin man's claim for $196,500 in damages against his female supervisor for demoting him because he refused her sexual advances; a suit by a New York student to determine whether "lip fuzz" is a mustache; a Washington Redskin fan's legal challenge to overturn a referee's call that ended a game against the St. Louis Cardinals unhappily; a test to propound judicially how many feet of available urinal space in an Alabama public institution constituted due process of law; a state prisoner's suit claiming negligence of officials for the loss of a $23.00 parcel; a plea for unspecified damages against managers of a Florida office building by a woman who fell off her toilet seat and injured her back; and the $200,000 damage suit against the federal government by the Episcopal Bishop of Central Florida, claiming that a knee injury he suffered on the Navy's tennis courts prevents him from genuflecting before the altar. By late 1985, of the ten examples cited, three had resulted in verdicts favorable to the plaintiffs; four had failed; and the decision was still to come in three. Whatever their fate, the fact of life of frivolous, unnecessary, outrageous, barratry-suggestive litigation is a truism.

[4] *Reynolds v. Sims*, 377 U.S. 533 (1964), at 624, dissenting opinion.

[5] *Annual Report(s)* of the Administrative Office of the U.S. Courts.

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Excessive Litigation

Three cardinal causes underlie the regrettable state of affairs of excessive litigation. As Chief Justice Burger has appropriately reiterated time and again, for each of these the organized bar bears a heavy responsibility.[6] Nonetheless, it is little short of amazing how few of the millions of words written contemporarily regarding the plight of the courts in the face of excessive caseloads address the center of gravity of the problem: first, the legal profession's eager and all-too-often artificial stimulation and application of litigation and its seemingly unstoppable success in fueling the adversary process. Of course, what the organized bar does is what, after all, all organized interest groups do: endeavor to advance their own economic welfare and security. Yet there is a seminal difference between the bar and the ordinary economic pressure group—the bar's responsibilities on the frontiers of the law of the land. Lawyers generate our laws; lawyers enact them (close to 70 percent of our federal legislators hold law degrees and 67 percent of our presidents have); lawyers promulgate the laws; they execute them; they enforce them (or do not enforce them); and they judge their legality and their constitutionality (the latter in their capacity as jurists). We are indeed a lawyer country; we are also a lawyered country.

As of mid-1985 there were 700,000 lawyers in our land. Comparing that illuminating figure with some of our sister democracies, we find that at that same time Japan had barely 12,000; the United Kingdom, our judicial system's parent, 53,000; New Zealand and Australia each had fewer than 10,000; France 30,000; Sweden 16,500. In 1970, there was one lawyer for each 700 of our fellow countrymen; one for each 410 in 1980; one for each 330 in late 1982; and one for each 320 now. To be even more specific, as of late 1981 there was one lawyer for every 18 inhabitants of Washington, D.C. (one for every 62 if we exclude those attorneys working for the government and thus merely count those in private practice); one for every 272 in the State of New York; one for every 274 in Colorado; and one for every 298 in California, followed in order by Massachusetts (1:309), Oklahoma (1:322), Illinois (1:323), New Jersey (1:334), Florida (1:354), and Minnesota (1:347).[7] These ten states have the highest ratio of lawyers to population. One may be certain that now, five years later, these statistical ratios have worsened. If the present trend continues, by the year 2045, Washington, D.C. will have become the perfect city-state: one active local lawyer for every resident of the federal city.

While Shakespeare's admonition, "the first thing we do, let's kill all the lawyers" (Dick, the Butcher, in *Henry VI, Pt. II*, act 4, sc. 2, line 83), would appear to be a mite drastic, it is crystal clear that we are producing infinitely too many lawyers. Influential citizens of Kentucky and California have recommended that some of the public law schools be phased out (proposals taken quite seriously in Kentucky, although not in California). Yet this arguably attrac-

[6] See, for example, Chief Justice Warren Burger, *Annual Report* on the State of the Judiciary.
[7] *American Bar Association Journal*, August 1982, 898.

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tive and sensible proposal has approximately as much of a chance of legislative adoption as effective gun control or the abolition of agricultural parity programs. It would have to be enacted by state legislators, a plethora of whom are lawyers themselves, who practice their legal profession most of the year. Still, it would be hardly remiss to urge the appropriate officials of the American Bar Association and influential legal academicians to consider exploring the practices of the medical profession in limiting access to its schools. One need not be so naive as to expect such a development to come to fruition; but it ought not to be rejected summarily—although it is destined to be. In his widely publicized 1982 Annual President's Report to Harvard's Board of Overseers, Derek C. Bok acknowledged and decried many of these problems. But his prescriptions for change were largely couched in grandiose generalities, liberally tinged by a combination of self-congratulations and *mea culpa* breast-beating while vaguely blaming that euphemistic whipping boy, "society."

The second reason for the overwhelming of court dockets and the products they deliver is informed by the courts' and the legislature's failure to control *access* to them. While courts do not have total authority over access—much of it is governed by statutorily-imposed obligations—the courts are not devoid of power to say "no" to putative litigants. This is especially true of the apex of the federal appellate level, where the Supreme Court has had finite authority since 1925 to deny petitions for writs of certiorari simply by declaring "certiorari denied." They do say "no," but not nearly often enough. While complaining bitterly of their unquestionably staggering workload, they still hear and act upon far too many frivolous or déjà vu cases. Perhaps the Court's "Rule of Four," which is the present threshold-vote requirement for granting review via a writ of certiorari, ought to be raised to a higher number—say, to five, as Justice John Paul Stevens has proposed, seconded by ex-assistant attorney-general, Daniel J. Meador, a leading authority on judicial reform. No legislation to effect such a change would be necessary. The Court is the master of its own rules of procedure.

Since late 1981, in what is a highly unusual and seldom practiced appeal to the public at large for help, eight of the nine sitting Supreme Court Justices have publicly complained about the Court's workload—and that of the lower courts—and the manner in which they are expected to deal with it. Many sensible suggestions for amelioration, such as the almost definitionally obvious one of removing the mandatory appeals jurisdiction group of cases in favor of an all-certiorari jurisdiction, and the one for depriving the judicial branch of certain types and classes of jurisdiction, were offered. Rather more questionable is the suggestion by several of the sitting Justices, lead by the Chief Justice, and joined by numerous lower-court jurists, to create a new court between the U.S. Courts of Appeals and the U.S. Supreme Court (and presumably, more jurists to staff them). Similar tribunals have been urged strongly by several distinguished and influential study groups, among them the Freund and Hruska Commissions. However, many professional and lay observers, who revere the judicial branch

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and crave amelioration of its litigation-glut plight, are strongly convinced that more courts will simply encourage the legal profession to stimulate more litigation. A compromise or countersuggestion may be the establishment of a number of subject-matter specialized courts at the trial or even at the appellate level, provided that their decisions would be final.

Huge compendia of time could be saved by jurists refraining from writing at such length as is more often than not the case, and, at the appellate level, by abstaining from the plethora of individual dissenting opinions and, in particular, of *concurring* opinions. The latter often constitute little more than quibbling and ego trips that could readily be abandoned completely or relegated to footnotes to the controlling opinion. The number of multiple opinions in a single decision has increased dramatically recently. Justice Stevens, for example, who has complained about the Court's excessive opinion writing, is by far the worst offender on the highest bench. It is at best difficult to communicate the gravamen of judicial opinions. What is the public to make of the increasing practice of as many as nine separate opinions in the same case disposition?

The third reason for the current litigation explosion and court-clogging is the already alluded-to excessive range and extent of jurisdiction that the legislative process has assigned to the courts. There is simply no justification for the continuing general *initial* jurisdiction over, and thus pressure of access to, the courts for some—or perhaps all—of the following litigation: the administration of bankruptcy estates; child custody cases; domestic disputes; automobile and similar accidents; personal injury cases; and property damage cases. All of these should, and could be adjudicated, at least initially, by nonjudicial bodies such as arbitration panels or administrative units of government. In the instance of the last three listed, no court-resort at all may be justified.

Some states, such as Pennsylvania for its "first-class" cities, have mandated the utilization of arbitration panels in all *civil* cases up to $20,000 (exclusive of interest and costs), except equity cases and those involving title to real estate. Created in 1958, and found administratively at the county court level (Court of Common Pleas), the arbitration panels consist of teams of three lawyers who hear and decide cases that would otherwise clog crowded court dockets. No matter how long the proceedings may take, the lawyer-teams—who are appointed by arbitration commissioners from a list of law firm-stimulated volunteers—are paid nominal fees of less than $100.00 per case. Since their inception these panels have handled an average of 10,000 cases annually—and they have done so inexpensively, speedily, and effectively. Another intriguing development is the founding, in 1984, of "Judicate," known as "the National Private Court System." It is one of several concerns created in recent years to offer alternatives to resort to the courts. In essence, "Judicate" and its prototypes are entirely private organizations that settle cases on the basis of state law, based on an ironclad agreement by the parties to the suit, be it of a civil or criminal nature, that they will abide by the decision. These genuinely private "tribunals" or arbitration units operating under bona fide contracts are usually headed by former judges,

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who preside in robes, hear lawyers for both sides, and question witnesses under oath. While state law and procedures are followed, there are no juries and the public is excluded from the deliberations.[8] In Columbus, Ohio, a quasi-public "neighborhood dispute center" handles 20,000 cases a year, many involving assaults. These alternative dispute resolutions modes not only cry out for adoption, they do work.[9]

There is simply no excuse for the continuation of the federal jurisdictional luxury of diversity of citizenship suits. These suits, which are there solely because the litigants come from different states, ought to be handled at the level of the states—especially because since 1938 the federal courts have been obliged to apply state law in *all* such diversity of citizenship cases.[10] They now constitute the single most numerous category of cases filed as civil suits, comprising 25 percent of the case load of the U.S. Supreme Court. Chiefly consisting of insurance claims, automobile accident, and personal injury suits, they should be removed totally from judicial tribunals and placed at the bar of administrative, ideally arbitration, panels.

The appellate game is approaching a judicio-legal outrage. Since the American judicial process is based on the litigation game via the adversary system, multiple and seemingly endless appeals have become the rule. "When at first you don't succeed, try and try several times again," seems to be a contemporary axiom. While no one can blame an accused party to a lawsuit for seeking to play that game via one of the numerous pathways provided by constitutional interpretation and statutory construction, it may come as a surprise to a good many that there is simply no such thing as a *constitutional* right of appeal. While such a right may, in a limited manner, be found in the statutes and/or constitutions of some of the fifty states, the United States Supreme Court has consistently denied the existence of any such right as a matter of federal constitutional law—although it has been provided by Congress in sundry instances. Every litigant, on both levels of our governmental system, is constitutionally entitled to due process of law; but due process has never envisaged the phenomenon of appeal-upon-appeal-upon-appeal. Thus, the ratio of appeals to criminal convictions after trial in the U.S. Court of Appeals for the Second Circuit now numbers 96 percent. In the District of Columbia it is 100 percent. It is vital to the health of a sensible judicial process that a limit be put upon the number of appeals in a single litigation. Capital punishment cases may be exceptions. But is there justification for thirty-six or forty-two separate appeals in the same capital case, as we have been witnessing with regularity of late? Even so true-blue a libertarian judicial activist as Justice William O. Douglas (who served on the Supreme Court for thirty-six and one-half years, longer than any other member to date) commented in a famed multiple-appeals capital punishment case, which featured

[8] See article by Martin Tolchin, *New York Times*, 12 May 1985.
[9] Special issue of *Judicature*, 69 (February-March 1986).
[10] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

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fourteen state and twenty-eight federal appeals, that "the conclusion is inevitable that appellant is playing a game with the courts. . . ."[11] It is vital that a limit be placed on the number of appeals available to litigants who come up to the federal courts after having exhausted their remedies at the state level, emphatically not excluding those ascending on writs of *habeas corpus*, as well as those emanating from prisons. These two classes of appeals from the state level constitute a problem that has been addressed with special concern by the Supreme Court's most junior Justice, and its first woman, Sandra Day O'Connor. In no small measure because of her jurisprudence the Court has begun to limit the excessive use of such writs attempting to find federal grounds for review after exhaustion of state remedies.[12]

The Adversary Process

How effective is the adversary process, the "sporting game," in the quest for truth and justice? The late Judge Jerome Frank, in his still indispensable critique of that process and its substructure, could visualize nothing *less* likely to bring out the truth than our adversary process.[13] Indeed, it is a system geared to the discovery of facts by jurors in a hostile, adversary setting. Jurors are usually at best only marginally qualified to judge the issues; they are increasingly chosen by outside specialists in jury profiles from panels of noncontroversial individuals whose regular activities society apparently does not value; they have ample time on their hands; and they have informed opinions and training on preferably nothing. More often than not, our juries reach a verdict on the basis of their perception as to which of the two sides has the better (more colorful?, more attractive?, more vocal?, more charismatic?) lawyer. Although there are notable exceptions (for example, the *Sharon-Time* 1985 libel case), it may well be doubted that juries are capable to answer accurately the fundamental question of guilt or nonguilt.[14] Special, rather than general, verdicts, coupled with the right to pose interrogatories to the litigants, either directly or through the presiding judge, and the use of the blue ribbon juries ought to be more widely adopted. An increasing body of literature emphasizes that the average attorney's quest is more often than not victory for his client (and thus victory both economically and psychologically for himself) and only incidentally victory for principled justice.[15] What lawyers should do when clients lie—whether they should advise against or assist

[11] *Chessman v. Teets*, 354 U.S. 156 (1957), at 170.

[12] See three 1982 rulings: *Engle v. Isaac*, 456 U.S. 107; *U.S. v. Frady*, 456 U.S. 152; and *Rose v. Lundy*, 455 U.S. 509.

[13] Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (New York: Atheneum, 1963), especially 85.

[14] For a less than complimentary, extensive analysis of juries, see Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France*, 5th ed., III, "Courts, Courtroom, and Juries," (New York: Oxford University Press, 1986).

[15] For example, Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975).

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in the lie—was presented to the U.S. Supreme Court in a fascinating case decided in the negative by a unanimous high tribunal in 1986.[16] The canons of ethics and the Code of Professional Responsibility—under perpetual but downgraded, low-key American Bar Association review—seem to offer no serious barrier to the pursuit of victory attained as a direct result of what Judge Frank pungently termed the successful invocation of the "Fight" v. "Truth" theory *cum* game.[17] It is a game, as he concluded acidly, in which

> the lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interests. Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.[18]

It may thus well be asked whether the Continental inquisitory system (the French *enquête*, featuring the institution of the *juge d'instruction*) might not be considered as a viable alternative to our accusatory one. How long can our society continue to practice a criminal trial system in which, in the words of attorney Jerry Paul, who successfully defended Joan Little in August 1975 in a widely-publicized and dramatized murder case, "the question of innocence or guilt is almost irrelevant."[19] In an interview following the trial, Paul said he "bought" Miss Little's acquittal and that it cost $325,000. "I can win any case in this country," he cockily-proudly contended, "given enough money. I'm going to tell you the truth. You must destroy the charade, the illusion of justice." Paul continued that by admitting that the acquittal was "bought"—the money was there to hire the best counsel, to mount an extensive jury selection process, to hire investigators, to fly in expert witnesses, to spend thousands on counseling Little to prepare her for her testimony—he was pointing up the defects of the system.[20] On the other hand, the presiding jurist in the case, North Carolina Superior Court Judge Hamilton Hobgood, observed that he thought Paul was quite wrong: the American legal system, not money, should be credited with the acquittal of the accused.[21] Yet the haunting doubts are not readily stilled. There is a crying need for dramatic change in the adversary system, and as Frank put it, "a considerable diminution of the martial spirit in litigation."[22] Neither minor nor major changes, however, can be effected without active cooperation of the legal profession.

Judicial "Judging" and "Legislating"

How can the judicial branch be harnessed within appropriate parameters of power and authority? How, in other words, can we draw that elusive line be-

[16] *Nix v. Whiteside*, 54 LVV 4194 (1986).
[17] Frank, *Courts on Trial*, chap. 6—a brilliant, devastating analysis.
[18] Ibid., 85.
[19] "Justice," *New York Times*, 26 October 1975.
[20] Ibid.
[21] Ibid.
[22] Frank, *Courts on Trial, 102.*

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tween "judging" and "law-making," between "finding" law and "making" it, between "judicial activism" and "judicial restraint," between the role presumably assigned to judges and the role presumably reserved to the legislative branch? The latter are the people's duly elected representatives who, for better or for worse, exercise the role and function of self-government. The line between "judicial judging" and "judicial legislating" is one fraught with definitional as well as interpretative and philosophical difficulties, and judicial legislating, like so many perceptions, may well lie in the eyes of the beholder. Al Smith's felicitous phrase, "it all depends whose ox is being gored," is apposite here. Yet it is neither definitive nor conclusive—nor must it be permitted to be either or both.

It is quite obvious that judges *do* "legislate." They *do* make law. One of the most consistent advocates of judicial self-restraint, Justice Oliver Wendell Holmes, Jr., recognized "without hesitation" that judges do and must "legislate." (More than once he would quip: "Why, made some myself—last Monday." But, he added significantly, the judges "can do so only interstitially; they are confined from molar to molecular motions.") Judges are human, but they also are judges. "Judges are men, not disembodied spirits; as men they respond to human situations," wrote Justice Felix Frankfurter.[23] Justice James C. McReynolds insisted that a judge neither can, nor should he, be "an amorphous dummy, unspotted by human emotions."[24] And Justice Benjamin Cardozo spoke elegantly of the cardiac promptings of the moment, musing that "[T]he great tides and currents which engulf the rest of men to not turn aside in their course and pass the judges by."[25]

Yet being human does not stand alone in the judicial decision-making process. A jurist is also presumably a qualified and conscientious member of the tribunal; he or she is in no sense of the term free to render a decision willy-nilly. There is a deplorable tendency on the part of many observers to oversimplify the judicial decision-making process. To a very real degree, jurists are "rigidly bound with walls that are unseen" by the average layman. These walls are built of the heritage of the law; the spirit of Anglo-Saxon law; the impact of cases as they have come down through the years; the regard for *stare decisis* (although there may well be conveniently several precedents from which to choose); for a genuine sense of historical continuity with the past, as Holmes put it, "is not a duty, it is only a necessity";—to him, "a page of history [was] worth more than a volume of logic."[26]

Still, not only do we often expect too much from the judiciary, we let it settle policy matters that ought to be tackled by the other branches. Witness such contentious issues as desegregation-integration, reapportionment-redistricting, criminal justice, privacy, and separation of Church and State. As Anthony Lewis

[23] As quoted in Abraham, *Judicial Process*, fn. 14, 339.

[24] Ibid.

[25] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921), 160.

[26] Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), 1.

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has observed so perceptively, "judicial interventions on fundamental issues are most clearly justified when there is no other remedy for a situation that threatens the national fabric—when the path of political change is blocked," but, as he should have added explicitly, *always assuming constitutional warrant*. This was indeed the case with the areas of endemic racial discrimination and persistent legislative mal-, mis- and non-apportionment. It is a fair question, however, whether the judiciary, especially at the trial court level, has demonstrably begun to overreach itself of late in those two realms, as well as in sundry others, such as the administration of justice by the states.

In sum, our courts should not be viewed as wastebaskets of social problems—which does not mean that law does not play an efficacious role in social reform. But the other branches *must* do their jobs. Congress simply lacks the will to do what is necessary. It possesses the tools, but passes the buck. Our constitutional constellation, however, does not conceive of the courts as society's primary lawmakers; it does not provide for government by the judiciary; we are supposed to be a representative democracy.

Of course, the Supreme Court of the United States is engaged in the political process, and within appropriate limits, so are the courts below it. But, in Justice Frankfurter's admonitory prose, it is "the Nation's ultimate judicial tribunal, not a superlegal-aid bureau."[27] Neither is the Court, to repeat the second Justice John Marshall Harlan's words, "a panacea for every blot upon the public welfare, nor should [the] Court ordained as a judicial body, be thought of as a general haven for reform movements."[28] The Justices have been quite succinctly styled "inevitably teachers in a vital constitutional seminar,"[29] but that is quite different than constituting themselves as a "national constitutional *convention*." Of course, the Justices consult their own policy preferences. Yet they are properly expected to do so in an institutional setting that forces responsibility upon them. They must meet and maintain high standards of integrity, intelligence, logic, reflectiveness, and consistency. They must demonstrate a sense of history, coupled with the realities and vagaries of public affairs, a task that has been aptly called "the hunch of intuition about the inner life of American democracy."[30] They have the exciting, yet delicate, task of heeding the "felt necessities of the time," in Justice Holmes's phrase.

On the other hand, no institution of government can be devised by human beings that will be satisfactory to all people at all times. The Supreme Court, our ultimate appellate tribunal, is much better at saying what the government may *not* do than in prescribing what the government *must* do and *how* it must go about doing it. The latter is essentially the task of the political branches. In-

[27] *Uveges v. Pennsylvania*, 335 U.S. 437 (1948), at 437.

[28] *Reynolds v. Sims*, 377 U.S. 533 (1964), at 624, dissenting opinion.

[29] Eugene V. Rostow, "The Democratic Character of Judicial Review," 66 *Harvard Law Review* 195 (1952).

[30] Judge Joseph C. Hutcheson, Jr., of Texas, as quoted by Eugene V. Rostow in *The Sovereign Prerogative: The Supreme Court and the Quest for Law* (New Haven, Conn.: Yale University Press, 1963), 110.

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deed, to reiterate a fundamental plea, the Court should resolutely shun *pre*scriptive policy making. It has quite enough to do in constitutional interpretation and statutory construction.

It may well be questioned, on grounds of both governmental wisdom and constitutional justification, whether the judiciary should be involved, as it has become increasingly, in such realms as *economic* equality as distinct from *political and legal* equality. It has often gone beyond the basic guarantee of equality of *opportunity* to an expectation of equality of *condition* or *result.* To turn to a different area of societal concern, one might well question whether the judiciary should deal with *private* morality as distinct from *public* morality? Paraphrasing Harvard's famed expert in Constitutional law, Paul Freund, the question is not whether the judiciary, with the Supreme Court at its apex, can do everything, but whether it can do something—and do that in its proper sphere. Naturally, these lines are often as brittle and elusive as they are vexatious, and courts neither can nor should escape controversy or criticism. In Justice Holmes' oft-quoted words: "We are very quiet up there, but it is the quiet of a storm center, as we all know."[31] As an institution at once legal, political, and human, the judiciary and the processes that characterize its raison d'être possess both the assets and liabilities that attend these descriptive characteristics. It has served the general welfare well, and it will live in our history.

Still, standing at the apex of the judicial hierarchy, and as the authoritative tone-setter of the judicial process, the Supreme Court must share both in the concerns and the responsibility for the status of the nature of that process. While it has endeavored to encourage ameliorations by word and deed—witness Chief Justice Burger's insistent and repeated efforts—it must share at least in part in the blame for the conditions that have given rise to such serious and abiding questions or criticisms as those presented in these pages. The Supreme Court's effective remedial powers are hardly unlimited, and it can do very little about such endemic problems as the ongoing litigation explosion, the multiplicity of lawyers, the adversary "game," and the jurisdiction either imposed or refused it by Congress. Nonetheless, its powers of moral suasion and the profound esteem in which it is held by the polity generally provide potential leverage for leadership in pointing the way toward desirable change on at least some frontiers of the contemporary judicial process. Leadership is not likely to emanate from the other players in the game. To harbor any realistic measure of success, however, the organized bar will have to provide support. Whether at least a modicum of such support will indeed be tendered lies at the heart of the dilemma.

[31] As quoted in Abraham, *Judicial Process*, fn. 14, 397.

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Changing Conceptions of Federalism

DEMETRIOS CARALEY

The intense debate taking place in the 1980s about the role government should play in promoting the "general welfare" concerns not only the total scope of governmental activity but also the level of government in our federal system that should perform what functions. The "New Federalism" of the Reagan administration has represented a bold and controversial attempt to reverse fifty years of American domestic policy by disassembling the constellation of grants to local and state governments that the federal government was using to help poor people and needy jurisdictions. Broadly speaking, the objectives of these federal grants were, first, to provide to the nonelderly poor a minimum level of income, food, housing, medical care, and job training; and, second, to subsidize local and state governments for the delivery of certain services unrelated to individual poverty, for the construction or rehabilitation of their physical infrastructures, and for incentives to stimulate their economies.

Federal financial aid programs to cities and states are based primarily on Congress's so called spending power, which derives from Congress's constitutional authority "to lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States."[1] As Congress exercised it since adoption of the Constitution and as the Supreme Court eventually ruled in 1936,[2] this clause permits the spending of federal monies not only in the substantive areas that Congress can regulate under its various enumerated powers but also for any purpose that comes within the meaning of the broad terms "general welfare" or "common defense" of the United States.

Some limited and sporadic forms of federal assistance to local and state governments date to the early 1800s.[3] But it was in 1933 during the depths of

[1] U.S. Constitution, Article I, Section 8.

[2] *U.S. v. Butler*, 297 U.S. 1(1936).

[3] See W. Brooke Graves, *American Intergovernmental Relations: Their Origins, Historical Development, and Current Status* (New York: Scribner's, 1969), esp. chaps. xiv–xv.

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the Great Depression that the federal government began to take on major responsibilities toward the poor and toward local and state governments. Then over the decades, and especially in the 1960s, it added various, mostly "categorical," social welfare programs to cover more categories of activities and more categories of individuals defined by the federal government as being most in need. It raised funding levels. It established grant programs that delivered aid directly to local governments and bypassed the state governments of which local governments were legal creatures. It established "block grants" and skewed allocation formulas for grant programs in order to "target" funds more to the so-called hardship cities and areas (those older and larger urban areas with large poverty populations primarily in the eastern and midwestern snowbelt) rather than spread those funds evenly among all cities and states. It amended eligibility standards from time to time to make it easier to qualify for individual benefits such as welfare, food stamps, and housing assistance. And it increased benefit levels, both to raise the minimum assistance being provided to the poor and needy and to compensate for inflation.

The main problem areas for which there were major federal grant and social welfare spending programs when the Reagan administration took office in 1981 were: poverty and unemployment (grants through states to local governments for providing cash "welfare" payments to low- or no-income families with dependent children, and food stamps, housing assistance, legal services, medical services, and public service jobs for the poor); physical decay and deteriorating economic bases of cities (community development block grants, urban development action grants [UDAGs]), and economic development grants and loans to local governments); education (grants to local school districts for compensatory services for disadvantaged students in elementary and secondary education, grants to local governments for job training for poor youths and adults); crime (law enforcement assistance grants for local governments); transportation (grants to local governments for highways and for mass rail and bus transportation); and general purpose financial assistance (general revenue sharing payments to local governments).

Proposals for New Federalism

During 1981 President Ronald Reagan proposed to Congress the following broad changes for the grant and social welfare programs then in place:

First, complete termination of some grant programs to local and state governments—urban development action grants, Economic Development Administration (EDA) grants and loans to economically distressed areas, Comprehensive Employment and Training Act (CETA) public service jobs, separate CETA job training programs for youths, mass transportation operating subsidies, legal services to the poor—on the basis that they were too costly or that they were ineffective in achieving their objectives or that they supported government functions that were simply defined as no longer being areas of valid federal responsibility;

Second, reduced authorization and funding levels across the board for almost

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all programs in order to lower the cost (in some cases the reduction was in the rate of increase that had been proposed by President Jimmy Carter in his budget, but in other cases the reduction was from existing spending levels);

Third, severe reductions in eligibility and reductions in combined benefit levels from individual benefit programs for the poor, like Aid to Families with Dependent Children (AFDC), food stamps, and housing assistance;

Fourth, consolidation of many categorical grants to local governments—such as compensatory aid for elementary and secondary education, community action, and legal services for the poor—into a small number of "block grants" to states as the preferred means of delivering federal aid and thus allowing each state to decide what specific functions and what specific problem areas it would assist (the funding for the block grants was, however, to be smaller than the total for the grants being consolidated into them);

Finally, elimination of some strongly targeted categorical grants such as UDAGs and changes in the allocation formulas of others in order to reduce the targeting to economically declining areas in favor of letting economic forces play out so that each city and state would, in effect, have to float on its own economic bottom even if that resulted in the tax bases of particular cities or states being much weaker than those of others for supporting the needs for services and benefits of its citizens.

In 1982 in addition to more spending cuts for particular programs, President Reagan further proposed two more major parts of his New Federalism for fiscal 1984. These were a "swap" or exchange of responsibility with the states for the three largest individual benefit programs for the poor: welfare, food stamps, and medical care or "medicaid"; and the shift to the states of responsibility for forty large and small social welfare, transportation, and community development categorical-grant programs. Under the swap proposal, beginning in 1984 the federal government would assume full, from partial, funding of medicaid, thus relieving the states and the local governments in those few states that mandated local governments to bear part of the cost of some $19.1 billion in funding. In return the states would assume the full funding of welfare and food stamps at a cost of some $16.5 billion if they chose to continue those programs. With respect to the shift of the other forty categorical programs that had some $30.2 billion in federal funding, the federal government would set up a "trust fund" to assist financing the programs during a transition period of 1984–1987. But then it would phase out such financing and end it by 1991, when the federal government would have dropped all individual benefit programs for the nonelderly poor except for medicaid and all grant programs except for interstate highways and compensatory education for disadvantaged students.

The Congressional Response

Congress in 1981 did reduce funding levels for essentially all grant and individual-benefit social welfare programs, including medicaid, welfare, housing assistance, job training, highway aid, food stamps, and child nutrition. But it ter-

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minated only one—grants to local governments for CETA public service jobs for the poor. Congress consolidated a number of small educational programs into a block grant, but insisted on maintaining as a separate, categorical grant, the large grant program for compensatory aid to elementary and secondary education; it established a community action block grant to the states but required that at least 90 percent of the state's allotment be passed on to local community action agencies; it consolidated nineteen categorical health programs into four block grants but imposed some conditions on how the funds could be spent by the states; and Congress refused to consolidate legal services to the poor, community development block grants, and the more highly-targeted urban development action grants. Congress made the eligibility criteria for welfare and food stamps tighter by in effect making ineligible the "working poor"—families who previously were poor enough to qualify because although a parent was employed, his or her income was previously regarded as low enough to qualify for benefits and/or part of it was "disregarded" if the earner had found his or her job while on welfare. The "disregard" provision had been designed to remove the extreme disincentive to welfare families of being dropped from the program if a parent began to earn income.

In 1982, Congress approved some minor additional reductions in welfare and food stamps and essentially ended the program for constructing new, rental-assisted housing. It also passed a new Job Training Partnership Act (JTPA) to replace the expiring CETA job training grant programs; the role of state governments and private business was expanded in JTPA and no provision was made for public service jobs. Congress never considered seriously the Reagan 1982 proposal for a swap of medicaid for AFDC grants and food stamps or the shifting of responsibility for the forty categorical grants to the states.

Party Politics and New Federalism

The successes of New Federalism in the 1981 session of the Ninety-seventh Congress resulted essentially from three factors. First, the 1980 elections brought about a decrease in the number of pro-federal aid Democrats and an increase in the number of anti-federal aid, pro-New Federalism Republicans in both the House and Senate. Second, Republicans decreased their support for federal aid from the already low levels of support that they had been providing in the post-World War II period. This included eastern Republicans in the House virtually stopping and in the Senate sharply reducing their traditional tendency to deviate from the remainder of their party and vote to support federal aid.[4] Third, the Republicans imposed a budget reconciliation process that made New Federalism changes on almost all social welfare and city and state grant programs simultane-

[4] All of these patterns were previously reported in Demetrios Caraley, "Congressional Politics and Urban Aid," *Political Science Quarterly* 91 (Spring 1976): 19–45; Demetrios Caraley, "Carter, Congress, and the the Cities," in Dale Rogers Marshall, ed., *Urban Policy Making* (Beverly Hills, Calif: Sage Publications, 1979), 71–98.

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ously in one series of votes instead of by traditional processes. Traditionally, in order to cut programs, floor majorities had to prevail on a separate set of votes for each such program.

The single most important factor was obviously the increase in the number of Republicans. With a net of thirty-two seats gained in the 1980 elections, the Republicans started the 1981 session with 192 members in the House—a number exceeded in the past three decades only in the Eighty-fifth Congress (1957-1958) during the Eisenhower administration and matched most recently in the Ninety-third Congress (1973–1974) elected in 1972 with Richard Nixon. These thirty-two new Republicans made a significant difference in the power distribution on federal social welfare grant programs. If the Republicans could stay together in their typical pattern of opposing federal aid, they needed only about twenty-eight Democratic votes, or only a 35 percent minority of the southern Democrats, to win. In 1981 the Republicans did stay solid as the eastern Republicans ceased their deviance. On the votes that split the parties most, a minimum of twenty-two southern Democrats joined the Republicans in voting for New Federalism initiatives. Thus on all but eight votes on which majorities of Democrats and Republicans were opposed, the Republican New Federalism position prevailed despite the House being nominally in Democratic hands.

The most critical floor votes were the six that the Republicans won on the Omnibus Budget Reconciliation Act of 1981, which revised laws to impose fiscal 1982–1984 cuts on a wide variety of city and state grants and other social welfare spending programs. On these votes, Republicans voted into law the New Federalism position by margins of 190–0, 188–1, 188–0, 189–0, 188–0, and 188–2. The Democrats unsuccessfully opposed New Federalism by margins of 29–209, 31–208, 27–212, 26–208, 29–209, 47–188.

Despite substantial media coverage of the support of the southern Democrats, or "Boll Weevils," for Reagan's New Federalism proposals, southern Democrats were in fact no less loyal to their party's majority in 1981 than they had been between 1977 and 1980. The deviance of the southern Democrats in the House was, however, much more critical in 1981 because of the closeness in the distribution of party strength in that chamber. This closeness allowed a minority of southern Democrats who consistently deviated to constitute the margin of victory in the House for key Republican-backed, New Federalism positions.[5]

In the 1981 Senate there were fifty-three Republicans as a result of the Republicans winning a net of thirteen Democratic seats. The fifty-three Republican senators constituted in 1981 an absolute majority of the chamber—the first since the Eighty-third Congress (1953–1954) in the first two years of the Eisenhower administration. Furthermore, in party votes the newly cohesive Republicans lost on average only from three to four of their numbers to the Democrats, while they were always able to attract 4 to 17 Democrats, mostly from the South. Accord-

[5] For a detailed analysis of the 1981 and 1982 voting patterns, see Demetrios Caraley and Yvette Schlussel, "Congress and Reagan's New Federalism," *Publius: The Journal of Federalism* (Summer 1986).

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ingly, the Republican, pro-New Federalism majority was outvoted only four times, when uncharacteristically for 1981, from nineteen to twenty-four Republican senators deviated from their party's majority and voted with the Democrats.

The distribution of party members in the House and Senate was essentially the same in 1982 as in 1981, save minor changes caused by deaths, resignations, and special elections. There was, however, a lesser degree of success in 1982 for New Federalism initiatives because Republicans in general gave them lower support in 1982, eastern Republicans resumed their deviance, and voting decisions were made by more traditional congressional methods. This meant authorizations and funding for different social welfare programs were voted upon more seriatim, not at the same time through an omnibus bill like the 1981 Omnibus Reconciliation Act.

Finally, with respect to the grand-scale swap proposals outlined in Reagan's 1982 State of the Union address, both Democratic and Republican governors and mayors communicated strong opposition to Democratic and Republican members of Congress over the prospect of having to assume major new funding responsibilities. Consequently no specific follow-up message or draft legislation was ever sent by President Reagan to Congress.

The receptivity of Congress to New Federalism proposals after 1982 was sharply reduced with the Republican loss in that year's elections of a net of twenty-six House seats. With this reduced Republican strength, along with a development of a new high level of party loyalty among the southern Democrats and resumed deviance among the eastern Republicans, the House was almost always capable of producing majorities for stopping further major cuts in social welfare and grant programs and defeating other New Federalism proposals.

In the Senate, on the other hand, the Republicans actually added a net of two seats in 1982, thus remaining in majority control and capable of blocking any expansions of grant programs to which President Reagan or the Republican Senate was opposed. Finally, Reagan's veto power gave him the ability to stop, with the support of only one-third plus one of the votes in either chamber, any social welfare spending measures that he opposed and that happened to get through both chambers.

The resulting 1983–1984 distribution of seats among the parties thus provided the environment for a politics of stalemate. Because of nominal and de facto Democratic control of the House, the Reagan administration and the congressional Republicans could not successfully impose major new social welfare spending cuts in city and state grant programs or devolutions of block grants to the states. Because of Republican control of the Senate and the power of President Reagan's veto, the congressional Democrats could not undo what had been done in the prior Congress or add new aid programs.

The massive reelection victory of President Reagan with 59 percent of the popular vote in November 1984, when coupled with an actual net gain of two seats in the Senate for the Democrats and a loss of only fourteen Democratic

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seats in the House, left the previous stalemate-producing distribution of seats essentially unaltered. This was so especially because many of the Democratic losses were among conservative, New Federalism-supporting southern Democrats, while five of the Republican gains were in the relatively more pro-spending East.

In 1985 President Reagan nevertheless returned in his budget for fiscal 1986 to a drastic New Federalism stance. He proposed complete termination of general revenue sharing (GRS) for local governments; urban development action grants; EDA grant and loans for public works and economic development; the community services block grant; mass transit operating subsidies; and legal services for the poor. Reagan also proposed freezes or spending cuts in aid programs that benefited the poor—including a two-year moratorium on any new commitments for low-cost housing or housing assistance. In its summer 1985 budget resolution, Congress refused to terminate any aid programs except GRS and even that, not until fiscal 1987. But the budget resolution did cut community development block grants and urban development action grants—sharply by 15 and 20 percent respectively—and made smaller cuts in other aid programs or kept them frozen at the previous year's spending levels.

Thus a politics of stalemate continued on what can be conceived as the macro level. Reagan could not succeed in a grand-scale New Federalism dismantling of the whole constellation of social welfare grants to local and state governments, while Congress could not establish new ones or restore cuts made in the previous four years. But while the stalemate continued on this macro level, on the micro level, more cuts—some major—were approved in the interests of deficit reduction. The outcome was that overall social welfare spending continued to decrease steadily, and the $200 billion budget deficit that was still left in 1985–86 remained as a lever to force even greater cuts and terminations in the years ahead.

The Gramm-Rudman-Hollings Act of 1985, for example, mandated a balanced budget by 1991 through cuts in spending, required half the cuts to come from domestic programs, but "protected" some programs like social security (a very large one), AFDC, and food stamps. Consequently to meet the targets, the "unprotected" grant programs like low cost housing, job training, mass transportation, community development, etc., which a group of Brookings Institution economists estimated had by 1985 already been cut by about 9 percent in absolute terms, would have to be cut still another 21 percent to 33 percent by 1989 to meet the Gramm-Rudman-Hollings targets.[6]

Toward the Disestablishment of the Union?

As we have seen, all the cuts proposed by the Reagan administration between 1981 and 1985 and especially the 1982 swap components were not adopted. Had

[6] Henry J. Aaron, Harvey Galper, Joseph A. Pechman, George L. Perry, Alice M. Rivlin, and Charles L. Schultze, *Economic Choices 1987* (Washington, D.C.: Brookings Institution, 1986), chap. 3.

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they been or should they be adopted in the future as a result of policy decisions or to reduce the deficit, the consequences would be so far reaching as essentially to constitute for domestic affairs a "disestablishment" or "dissolution" of the Union that had grown out of the Constitution of 1789:

• The disparities that already exist between rich and poor people and between rich and poor local and state jurisdictions would get larger.

The assignment to localities and states of the funding responsibilities for social welfare programs means that there will be a tremendously wide range in the ability to replace federal aid with funds generated by local and state taxes. Jurisdictions with high taxable resources and low concentrations of poor people—for example, thriving high-tech areas and high-income suburbs—will have the capacity to keep services high, to provide (if they choose) the current levels of benefits to the small concentrations of poor people within their borders, and to keep tax rates low. Jurisdictions with low taxable resources and high concentrations of poor people—for example, snowbelt states with high levels of unemployment and the larger, older declining cities primarily of the East and Midwest with high concentrations of ghetto poor—will have little or no capacity to substitute state and locally-generated taxes for lost federal aid.

Many of these poor local jurisdictions are already imposing high taxes relative to the low level of services they provide. Some have tax rates approaching or actually at state legislative or state constitutional limits. All are subject to state legislative or state constitutional and local city charter requirements for annual balanced budgets. And all fear that increases in local taxes, even if technically possible, would be counterproductive by providing greater incentives for mobile, high-income families and prosperous businesses that still remained to move out. These families and businesses would thus be avoiding the tax increases for themselves and further eroding the fiscal capacity of the jurisdictions they leave. Such erosion would cause further reduction of services and benefits and/or further increases in the tax rates to make up for a smaller tax base. There would thus be a tendency for currently wealthy jurisdictions to become even wealthier and fiscally stronger as they attracted still more upper-income families and prospering business. And poor jurisdictions would become even poorer and incapable of continuing even the lower levels of services and benefits they now provide as they lost still more of their economic base and also lost federal aid.

• The vast majority of large central cities of metropolitan areas would be hurt.

Especially in the East and Midwest, such central cities suffer the greatest mismatch between need for poverty-related services and benefits and for maintenance or replacement of aging infrastructures, on the one hand, and the fiscal resources to pay for them, on the other. Consequently they are heavily dependent on federal and state aid. Six such large cities—Newark, Baltimore, Buffalo, San Francisco, Milwaukee, and New York City—had from 50 to 69 percent of their

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general expenditures funded by federal and state aid in fiscal 1980 at the end of the Carter administration, while another eleven cities received federal and state aid covering 40 to 50 percent of their general expenditures.[7]

The elimination of targeted federal categorical programs that provided aid to cities directly—like community development block grants, urban development action grants, transportation grants for capital and operating expenses, and general revenue-sharing payments—would mean that cities would have to look to their states for replacement of such aid or cut their own services further. Yet in no state is the population of its large cities—say, those of 250,000 or above—anywhere near a statewide majority, which means that these cities will have little leverage either in elections for governors or in state legislative bodies where voting strength is based on population. Indeed, it was in part because state governments did not in general treat their large cities fairly, but even at times exploited them in the distribution of state aid, that direct federal local government funding relations developed.

Furthermore, the states themselves would also be losing federal aid for welfare, food stamps, highways, and other programs now heavily federally aided. Rather than being in a fiscal position to deliver more state aid to their local governments, states will be hard pressed just to generate new revenues to replace the federal aid they themselves have lost. As a result, aid for welfare and other poverty-related benefits and services that now come to large cities from their states also will be in jeopardy.

• Even wealthy jurisdictions will have incentive to not increase or to reduce poverty-related services and benefits.

Just as local and state jurisdictions will not want to give incentive through higher taxes for upper-income families and businesses to move out and erode their tax bases, so too they will not want to give incentive for low-income families to move in. This means that it will be in no jurisdiction's interest to keep poverty-related benefits and services high, because such high benefits and services might serve as a magnet for low-income families and increase the "high-service-and-benefit-consuming," rather than the "revenue-generating" part of its population.

• All of the previous factors in combination will produce a constant "ratcheting down" of minimum benefits and services for the poor.

Over time, as some jurisdictions are perceived as having "low tax/high essential services/low poverty services" profiles, other jurisdictions in order to stay competitive will probably find it necessary or expedient to reduce services and benefits to the poor even more in order to keep their own "low tax/essential services/poverty services" mix competitive, thus stimulating still more jurisdictions to cut poverty services to remain competitive, etc., etc.

[7] Calculated from U.S. Bureau of the Census, *City Government Finances in 1979–80* (Washington, D.C.: U.S. Government Printing Office, 1981), Table 8, 98–109.

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In sum, the past fifty years of social welfare policy was based on the premise that only the federal government could afford to fund benefit and services programs for poor people and poor cities and states. This was because the federal government's tax reach is all encompassing—taxpayers cannot move to lower-tax jurisdictions to reduce the amount of their income taken by taxes. Only the federal government is allowed to run a deficit, if necessary, in its annual budget to provide funds. At least from World War II to the 1970s, the federal government had the most productive tax system, able to raise increasingly larger increments of revenue with each increment of economic growth or of inflation. Finally and most importantly, it was widely felt that the federal government was ultimately responsible—the "subsidizer-of-last-resort" or "bailer-outer-of-last-resort," so to speak—for keeping local and state benefits and services above some minimal threshold and for intervening to help with major problems that could not be or were not being successfully addressed by local or state governments.

One of the central premises of the Reagan administration was that it was precisely the federal tax system's efficiency in taking a larger and larger tax bite out of the economy that had caused the economy of the 1970s to be so sluggish. And with the stagnant but inflationary economy of the 1970s, that bite was not even coming out of real economic growth but out of the living standards of the broad middle class as it was subjected to inflation-driven bracket creep. The overriding domestic objective of the Reagan administration was, therefore, to spur vigorous economic growth with tax cuts and to rely on that projected economic growth to take care of the problems of the poor. Starkly put, the New Federalism's ideological posture was that it no longer wanted, could not afford, and did not deem it legitimate to be the ultimate subsidizer of poor people and local and state jurisdictions—and certainly not at the level of subsidy enjoyed in the 1970s.

Rhetoric and Political Realities

The language of the Reagan administration's New Federalism had many allusions about returning to local and state governments—"the governments closest to the people"—the power to make the choices about what mix of taxes, essential housekeeping services, and benefits and services for the poor their citizens should have. The implications were two: that every local and state jurisdiction had enough taxable resources to be afforded a real choice; that the federal government's intervention to fund grants to localities and states and individual benefits for the poor had been in some sense a usurpation that took place presumably against the wishes of state and local officials and state and local electorates.

In reality, most federal programs were taken on because local or state officials indicated either an unwillingness or an incapacity based on a mismatch between resources and needs to deal with the problem to which the federal program was responding. State and local government participation has been voluntary in virtually all grant programs, and indeed state and local governments did not get supplanted by a federal bureaucracy but were the governments that actually ad-

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ministered, albeit subject to federal regulations, the programs receiving federal aid. Also, federal grant and individual aid programs were not developed in a vacuum by some federal establishment insulated in Washington, D. C., with little contact or awareness of local and state conditions and needs. Generally, federal programs are developed in full consultation with local and state officials who both testify and lobby on different aspects. They also must be approved by a Senate whose membership is elected from the fifty states and a House of Representatives elected by 435 local subdivisions of states. In this kind of governmental system, no federal program that has strong opposition in many states or localities can pass. Thus, the federal involvement with social welfare and other grants to local and state governments reflected not a usurpation, but the traditional pattern in American government that if a serious domestic problem is to be solved, all levels of government including the federal one must join in a cooperative effort to cope with it.

And this potential expansion of the federal role was something the constitutional fathers foresaw. James Madison, no friend of federal usurpation, asked rhetorically in Federalist numbers 45 and 46 of the states' rights opponents to the new constitution:

> . . . if . . . the Union be essential to the happiness of the people of America, is it not preposterous to urge as an objection to a government, without which the objects of the Union cannot be attained, that such government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of American should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? . . . the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value that as it may be fitted for the attainment of this object. . . . [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter. . . .
>
> If . . . the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due. . . .[8]

The Future of New Federalism

The prospects for further successes of New Federalism proposals or for a return to what might be called a more benevolent, "subsidizer" or "bailer-outer-of-last-

[8] Alexander Hamilton, James Madison, John Jay, *The Federalist Papers*, (New York: Mentor Books, 1961), 288-289, 295.

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resort" federalism will essentially depend on the distribution of party strength in Congress and the White House, on the federal government's fiscal condition, and on elite beliefs and broad public opinion about the federal responsibility for problems of individual and family poverty and for alleviating extreme disparities among local and state government services and unhealthy social and physical conditions in different areas of the United States.

Party Strength

The importance of the distribution of party strength in the two houses of Congress and the party affiliation of the president comes from the fact that since the 1930s it has been Democrats in Congress (with the exception of the southern Democrats) and Democratic presidents who have supported the expansion of the federal government's role in social welfare programs for the poor and grant programs for distressed state and local governments. And it has been Republicans in Congress (with some exceptions among eastern Republicans) and Republican presidents who have not.[9]

The politics of any resumption of benevolent federalism thus requires that the Democratic party in the forseeable future capture the presidency, take back control of the Senate, and keep de facto as well as nominal control of the House. But this prospect depends on whether the election to the presidency in 1980 and 1984 of Ronald Reagan and the Republicans taking and retaining control of the Senate in these elections reflect that a new long-term Republican electoral majority has emerged, committed to ideological conservatism and to a reduced federal role in principle and unrelated to short-term budgetary stringencies.

The answer to that question obviously lies in the future. But it should help to recall that Ronald Reagan won the presidency in 1980 with 50.7 percent of the popular vote or a margin over his combined opponents of only some 1.3 million out of 86.5 million votes cast. The illusion of his having received a massive mandate is based on the correct perception that President Carter was defeated by a wide margin and that President Reagan's electoral vote majority was huge—489 to 49. But the popular vote "landslide" that took place was from under President Carter's feet, with part of the anti-Carter vote having gone not to President Reagan but to third-party candidate John Anderson.

Furthermore, analysis of public opinion data reveals that in 1980 any mandate of the Reagan administration was only for such general goals as cutting taxes, reducing inflation, increasing economic growth, and strengthening the American position in international affairs mainly by building up military strength. Public opinion polls show that majorities of Americans were *not* clamoring for reduced federal intervention and spending on specific programs and problems. Indeed, a series of major polls conducted by the National Opinion Research Center of the University of Chicago showed that large majorities—and in many instances,

[9] Caraley, "Congressional Politics and Urban Aid."

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record large majorities—of Americans believed that government spending was not "too much" but either "too little" or "about right" on halting crime, drug addiction, health, education, the environment, problems of big cities, improving the conditions of Blacks, space exploration, and defense. Only on foreign aid and welfare did majorities claim that current spending was "too much."[10] Finally it should be remembered that during the 1980 campaign, President Reagan himself promised to balance the budget only by cutting the rate of increase in federal government spending, not by drastically cutting spending from then existing levels.

In sum then, the case that a new long-term Republican conservative electoral majority has emerged is not yet proven. Broadly speaking, what seems to have developed in America is not a permanent conservative realignment but an increasingly volatile or "dealigned" electorate unwilling to make a long-term commitment to support either party and prepared to shift its allegiance from presidential election to presidential election on the basis of its satisfaction with an incumbent administration's and party's performance, particularly on economic growth.[11] For an administration's program to become an enduring, long-term part of the nation's fundamental public policy consensus, it must be embedded in that consensus by the impact of popular ratification in successive elections. To the extent that those ratifications take place, they reflect that the program has been technically successful in promoting widely-held objectives and that, as a result, the minority party will stop actively opposing the new program and the issues raised will be relegated to the body of settled questions.

The massive reelection victory of President Reagan in 1984, coupled with continued Republican control of the Senate, certainly constituted some kind of interim popular ratification of the policy changes his administration had succeeded in bringing about. But there is no convincing proof that whatever the economic conditions or the identity of the Republican presidential nominee in 1988, the Republicans will again win the White House automatically and add to that control of Congress because of their now permanent voting majority.

Budgetary Constraints

To understand how fiscal conditions affect the prospects for federal funding of social welfare programs, it may be useful to flash back to the 1960s when the federal government's condition was not one of fiscal stringency but of plenitude. Writing in 1966, Walter W. Heller, who had been chairman of President John F. Kennedy's and President Lyndon B. Johnson's Council of Economic Advisors, postulated that with a continuingly growing economy, the then existing rates of the federal tax system (there had been a "stimulus" tax cut in 1964) would produce built-in average increases in revenues of $7 to $8 billion a year in excess of

[10] NORC General Social Surveys, 1977 to 1980.

[11] See Everett Carll Ladd, "The Brittle Mandate: Electoral Dealignment and the 1980 Presidential Election," *Political Science Quarterly* 96 (Spring 1981).

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those needed to meet rising federal expenditures. This excess of revenues over expenditures constituted what Heller termed a "fiscal dividend" that would have been available for direct federal spending or for grants to other levels of government. Indeed, Heller argued that this excess revenue would become an undesirable "fiscal drag" on the economy and dampen its growth if it were not spent through direct federal spending or grants or returned to the taxpayers in further tax cuts.[12] Based on these widely accepted premises, there was at that time much discussion about sizable portions of these dividends being devoted to strengthening federalism by enlarging categorical grants and establishing revenue-sharing payments to local and state governments to help them deal with poverty and other social welfare and urban problems.

Unfortunately for the fiscs of local and state governments, the escalation beginning in 1965 of the war in Vietnam absorbed all the expanded revenues that became available. The war also caused what was then considered a huge deficit of about $25 billion in fiscal 1968 and necessitated the 1968–1970 tax surcharge to raise larger revenues and reduce the deficit, thus putting a heavy damper on any greatly expanded federal grant spending for social welfare problems. But even as expenses for the Vietnam war began to contract between 1969 and 1972 with the reduction of the American ground force commitment, no new fiscal dividends became available to be diverted to social welfare needs.

First, the entire amount of the reduced military expenditures was smaller than the federal deficit. Second, the ending of the tax surcharge and the general reduction in personal and corporate income taxes that had been legislated in 1964, 1969, and 1971 seriously weakened the previous capacity of the federal revenue-raising system to generate large amounts of new revenues year after year. Third, just as federal tax collections were showing a substantially smaller automatic annual growth, expenditures for civilian programs, of which social security transfer payments and social welfare-oriented "Great Society" grant programs were a big chunk, began in 1965 to increase much more sharply than in the past and faster than the growth in the nation's economy.

The implication of these trends for domestic social welfare programs was simply that with the existing federal tax structure and even a non-recessionary economy, the projected automatic growth in domestic expenditures alone had begun to exceed the projected annual gain in revenues yielded by economic growth. This meant that any new or expanded social welfare grant programs could not be funded by the federal government "painlessly" out of "fiscal dividends" but had to come at the expense of other programs or from a tax increase. There was another alternative for the federal government, and that was financing new and expanded programs through continuously larger budget deficits. But that alternative too was not "painless," since it was perceived in the 1970s to carry serious inflationary effects.

Despite the continued budget deficits through the Nixon, Ford, and Carter ad-

[12] Walter W. Heller, *New Dimensions of Political Economy*, (New York: Norton, 1967), chap. 3.

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ministrations ranging from a low of $2.8 billion in fiscal 1970 to highs of $66.4 and $59.6 billion in 1976 and 1980, the Reagan administration went into office in 1981 with a commitment to a major increase in defense spending and to a major cut in individual and corporate income taxes. Part of the Reagan justification for the tax cut was that it would in fact cost nothing with respect to the deficit, since the extra income kept by individuals and corporations would according to supply-side theory stimulate enough new economic activity to generate more new revenues than the revenues forgone by the tax cut. Technical experts at the Congressional Budget Office (CBO) and the staff of the Joint Committee on Taxes forecasted, however, a massive loss of revenues, beginning at $37.7 billion in 1982 and climbing to $267.7 billion in 1986. (After the tax increases legislated in 1982 by the Tax Equity and Fiscal Responsibility Act [TEFRA] and changes that had to be made in certain other economic assumptions, the revenue to be lost 1986 was in 1983 recalculated by CBO and the Joint Committee to be $205.2 billion).[13]

In short, through its tax cut and its increased defense spending, the Reagan administration created unprecedentedly large budget deficits that produced an "austere climate of opinion"[14] in which proposed cuts and eliminations of social welfare programs, not spending increases and new initiatives, have become the Washington agenda in the discussion of federal domestic programs. "Victories" in Congress for supporters of federal aid have become simply saving a program from termination or taking a smaller cut than that proposed by the Reagan administration and not improving its quality. And in this climate of opinion, even pro-aid Democrats have to go along with some cuts in order not to appear fiscally irresponsible against a background of a $200 billion deficit.

Of course, by the same deliberate choice that made its tax system less efficient in raising revenue, the federal government can again make it more efficient. The group of Brookings economists previously cited believe that if most of the spending cuts mandated by Gramm-Rudman-Hollings are actually made, a high employment economy is sustained, and a tax increase of about $50 billion is enacted, there might be available by 1987 a margin of $4 billion and by 1989 one of $8 or $10 billion to selectively restrengthen social welfare programs[15]—sums much smaller than the cuts and terminations in social welfare programs made since 1981. Yet even if such modest margins are generated, there will be powerful claimants for the funds besides spokesmen for social welfare grant programs. In any event, without a reduction of the budget deficit to a more traditional level through greater economic growth or through larger tax increases, the New Federalism's removing of a "safety net" from under poor government jurisdictions, even if not from under poor people, will be impossible to stop.

[13] Gregory B. Mills and John L. Palmer, eds., *Federal Budget Policy in the 1980s*, (Washington, D.C.: Urban Institute, 1984).

[14] Paul E. Peterson, "The New Politics of Deficits," *Political Science Quarterly* 100 (Winter 1985–86): 575.

[15] Aaron et al., *Economic Choices 1987*.

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Public Philosophy

There is the possibility of an even more fundamental, long-term threat existing than the party-political and the budgetary ones to resumption of a more benevolent, "subsidizer" or "bailer-outer" federalism. This would be the case if there is developing a new public philosophy among elite and broad public opinion (including not only Republican but also Democratic members of Congress and Democratic aspirants to the presidency) that doesn't support efforts by the federal government to redistribute resources from those persons and geographic areas of relative affluence to those of relative poverty and distress in order to reduce wide disparities within our nation.

Reagan's official rationale for his 1981 budget proposals displayed this point of view. His justification for terminating the Economic Development Administration's grants and loans for economically distressed areas—a proposal Congress did not accept—was, in part, that those grants and loans had been "misdirected subsidies" that "lock[ed] people and resources into firms and areas that have lost their economic viability," and that the nation was unjustifiably paying for this "subsidization of inefficiency through direct budgetary costs and hidden costs of decreased productivity and economic growth."[16]

His proposed termination of CETA public service jobs—which was approved by Congress— was justified as "return[ing] CETA to its original purpose of improving the long-term employability of the low-income . . . structurally unemployed by providing them with skills" through direct training programs and abandoning the "'government as employer of last resort' philosophy" that presumably underlay public service employment.

Reagan's proposed reduction of eligibility and benefits for welfare and food stamps was to stop those not "truly needy," i.e., those who were earning some income, from getting benefits and stop even those who were "truly needy" from getting any more food stamps than were absolutely essential for "adequate nutrition." Otherwise food stamps would have become "a generalized income transfer program, regardless of nutritional need."

Certainly nothing in the 1984 presidential campaign or in the outcome of the 1984 election suggested that many Americans were demanding that cuts in social welfare spending and other federal aid to state and local governments be restored, despite government statistics and other studies showing a rise in the percentage of the population in poverty.[17] To the extent that they took domestic policy into account, most Americans seemed willing, in exchange for renewed

[16] All these quotations come from Office of Management and Budget, "Additional Details on Budget Savings—FY 1982 Budget Revisions" (Washington, D.C.: U.S. Government Printing Office, April 1981).

[17] On the other hand, it is important to note that in opinion surveys, majorities or pluralities in 1984 felt that "too little" was being done about the "environment," the "nation's health," "problems of big cities," the "crime rate," the "nation's education system," and the percentage believing that "too much" was being done about "welfare" had dropped to 41 percent from 59 percent in 1980. NORC General Social Survey, 1984. I am indebted to my colleague Robert Shapiro for these data.

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economic growth and cuts in taxes, to tolerate a disproportionately large share of that growth going to higher-income families and a permanent lowering of the economic floor below which the conditions of the poor had not been allowed to drop in the 1970s.

Should the Reagan administration continue to bring about economic growth leading to improvement in standards of living for middle-class Americans, avert economic disaster from the massive deficit it has amassed, prevent general tax increases and keep intact the indexing to inflation of tax brackets (and absent some foreign policy catastrophe), the Reagan administration's New Federalism ideology of reducing support for the poor and reducing or eliminating aid to local and state governments might become permanently embedded in the national consensus. Such would be a strong implication from any election in 1988 of a presidential successor pledged to the Reagan point of view and Republican control of the Senate, if not the House, by majorities pledged primarily to deficit reduction and low taxes.

Another part of such a new public philosophy would be an acceptance by Americans of localities and states having to sink or swim on their own regardless of how meager their economic base might be relative to their service needs, even if that meant that in some localities and states in the country conditions would be drastically below that in others. This would be so despite the fact that some jurisdictions with the worst conditions would be imposing higher taxes than those with the best conditions.

If the Reagan economic policy stops providing economic gains and especially if the huge budget deficit brings sharp economic dislocations, there will probably be a shift away from New Federalism policies. Democratic presidential and congressional candidates calling for a change of direction away from reducing the federal benefactory role and from economic and tax policies disproportionately favoring high-income people and large corporations and toward more traditional Democratic policies for dealing with recessions would then be favored. Such policies would include increased federal spending—though that would be difficult even for Democrats if the size of the budget deficit were still massive—to stimulate the economy and to provide public service and public works jobs for the unemployed through direct federal spending and also through grants to local and state governments in order to provide countercyclical impact.

Even then, there probably would not be a climate of opinion in favor of reviving and restrengthening federal grant and other social welfare programs to the spending peak they had reached in, say, 1978. There would be the need to be highly selective about what programs to concentrate on and thus to target federal aid not only to "truly needy" people, but also only to "truly needy" local and state jurisdictions. Programs like mass transit operating subsidies and capital grants that seem to be simply redistributing taxes geographically to jurisdictions that have or want to build mass transit facilities whether or not these jurisdictions are highly distressed economically might have to be dropped. The major vehicle for delivering federal aid to local and state jurisdictions could be a new general

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revenue-sharing formula grant based heavily on the economic resources of local and state jurisdictions relative to the socio-economic characteristics of their populations and with a weighting of their own tax efforts. Unlike the original revenue-sharing program passed in 1972 that made payments of varying size to all local and state governments, a high threshold of need or distress should be set for a jurisdiction to be eligible to receive any aid at all and above that threshold the sharper the distress, the deeper would be the per capita subsidy. Essentially a safety net would be sustained for poor jurisdictions much like the safety net that is accepted for poor individuals and families. Traditionally Congress has not looked with favor on grant programs that don't potentially benefit most states and congressional districts, but the reality of limited resources might change the mindsets of members of Congress sufficiently for them to allow targeting of those scarce resources sharply.

Also, political leaders, commentators, and other opinion elites might resume articulating and have reaffirmed in public opinion a philosophy that stressed the federal government's role as "subsidizer" or "bailer-outer" of last resort, somewhat like a giant insurance company, available for compensating individuals and governmental jurisdictions being hit by short- or long-term emergencies that were beyond their powers to control. In this respect, the economic distress being suffered in the mid-1980s by sunbelt cities and states because of the decline of oil prices—a problem that no one anticipated as recently as five years before—might serve to remind Americans of their self-interest in such a federal government given the transitory nature of much good fortune and the vulnerability to problems and distress of persons and jurisdictions once thought to be permanently well-off and advantaged.

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Rethinking the Silences of Social and Economic Policy

IRA KATZNELSON

In May 1946, the National Educational Committee for a New Party announced its existence. Its membership included James Patton, the head of the Farmers Union; Walter Reuther, the president of the United Automobile Workers; other trade unionists (including A. Philip Randolph, who chaired the organization); John Dewey; and Norman Thomas of the Socialist party. Its provisional declaration of principles, drafted in part by Daniel Bell, called for postwar planning; full employment; corporatist cooperative arrangements between business, labor, and government; a comprehensive national housing program; and "social security for everyone from the cradle to the grave." These ideas to promote the general welfare built on the wartime work of the National Resources Planning Board, the economics of Alvin Hansen, and the example of the Attlee government in Britain. They borrowed liberally from the rhetoric of Franklin D. Roosevelt's 1944 reelection campaign.[1]

At the time, they were not easily dismissed. They appeared to define the outer limits of the ongoing political conversation about the future of the welfare state. By the end of the decade, however, the committee was defunct, and virtually all the ideas in its founding document were no longer considered seriously. The political agenda had contracted to what later came to be called the liberal or the Keynesian consensus.

[1] "Ideas for a New Party: Provisional Declaration of Principles, National Educational Committee for a New Party," *Antioch Review* 3 (Fall 1946); Alonzo Hamby, *Beyond the New Deal: Harry S. Truman and American Liberalism* (New York: Columbia University Press, 1973), 138-139.

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Thirty years after the New Committee published its statement, Robert Bartley, the editor of the *Wall Street Journal*'s editorial page, denounced this liberalism as an "establishment [that] has ordered our political and intellectual lives for the past two generations." He took note of the exhaustion of liberal ideas; he predicted "that over the next few years we will see an increasing challenge to the very heart of liberal economic thinking, to the Keynesian orthodoxy itself"; he argued that the expansion of the welfare state and the economy's quest for savings and capital formation were antithetical goods; and he called for intellectuals to reject conventional wisdom and build a new, more conservative establishment.[2]

I attended the conference in 1976 at Columbia University on "The Relevance of Liberalism" when Bartley presented these ideas, and I remember well how his views were thought to be interesting but utopian—surely well outside the mainstream. Four years later, a new president, drawing on the intellectual capital of conservative intellectuals, began to implement much of this design for a more modest state and more reliance on markets.

The two markers, 1946 and 1976, remind us that the ways in which Americans have conceptualized the welfare state and its possibilities have sharply diverged, and that the nature of political language is mutable. From this vantage point, the politics of social welfare in the United States is hardly fixed: it expands, contracts, and shifts its axes of conflict over time.

But not without distinctive limits. Arguing against the idealist hypothesis that certain cultures do not have "the capacity, as evidenced by their language, to think certain concepts," Raymond Williams claims instead "that historically there are certain language situations which are repressive. People talk of language as a means of expression, but it is also evidently a means of selection. In certain social-historical circumstances, there are things which could not be said, and therefore, in any connecting way not thought."[3]

The "not said" and the "not thought" of economic and social policy in the United States ever since the late 1940s is less difficult to characterize than to explain. American Keynesianism has been conservative, choosing to deal exclusively with questions of demand and distribution. Peak association corporatism linking business, labor, and government is virtually unknown. There is no national capacity to plan. Employment policy is a pastiche of ameliorative programs incapable of making a dent in structural and cyclical unemployment. Public housing is meager and starved for funds. The welfare state lacks many programs familiar elsewhere, especially in health and family allowances. It distinguishes very starkly between social insurance and means-tested welfare programs. It developed late. And it remains small in size, capturing a comparatively limited share of tax revenues and national wealth.

[2] Robert L. Bartley, "Liberalism 1976: A Conservative Critique," paper prepared for Conference on the Relevance of Liberalism, Research Institute on International Change, Columbia University, January 1976.

[3] Raymond Williams, *Politics and Letters* (London: New Left Books, 1979), 182.

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American debates about the scope and role of government oscillate between two positions to the exclusion of a third commonly found in other western capitalist democracies. Two poles define "the said" of social and economic policy discussions, in the language of Norman Furniss and Timothy Tilton's *The Case for the Welfare State*. First is the "positive state," which is designed as a helpmate to the market and has few regulations, leaves market patterns of distribution alone and has some social insurance programs to underpin the market. Second is the "social security state," which strives to define a security floor for all citizens to underpin market relations and outcomes.[4]

If recent developments have reintroduced debate about these two poles of fundamental values and characteristics of social and economic policy, these discussions have not included, as a broad orienting option, a third possibility. It is associated principally with the class-based social democratic and labor parties of western Europe and with various strains of ethical, Christian, Marxist and humanist socialism: that which Furniss and Tilton call the "social welfare state" whose self-conscious aims include equality and solidarity.[5] As a consequence, both the limits on state activity and on political debate about the role of government are more narrow in the United States than most conservatives elsewhere would wish or hope to achieve. One thoughtful observer, taking the history of the past four decades into account, concluded that the social democratic route to the future "is probably closed. Any attempts to ground American anti-poverty policy in a highly egalitarian, social democratic vision of society is trying to recreate a possibility that has passed, if such a chance ever existed at all."[6]

Yet, Hugh Heclo continues, "It is at least conceivable that in the 1930's and 40's, a pro-egalitarian movement might have succeeded. . . ." His retrospective and prospective judgments imply a number of important questions about how issues enter, or do not enter, the political arena; about the outer contours of the political culture, and how they change or might change at certain critical, relatively indeterminate moments; and about variations in policy debates within these parameters.

In order to better understand these issues, I have recently begun a study focusing on the Roosevelt and Truman administrations of the 1940s and on the Carter and first Reagan administrations of the past decade. I am particularly keen to diagnose those moments when both the outer limits of what is possible broaden and clashes within those limits sharpen. My aim is twofold: better scholarly understanding and a more self-reflective political conversation about the future of the welfare state.

[4] Norman Furniss and Timothy Tilton, *The Case for the Welfare State* (Bloomington: University of Indiana Press, 1977).

[5] Ibid. For my part, I find the various writings of R.H. Tawney remain the most eloquent statements of this position. See, for example, R. H. Tawney, "Social Democracy in Britain," in *The Radical Tradition* (London: Allen and Unwin, 1964).

[6] Hugh Heclo, "The Political Foundations of Anti-Poverty Policy," paper prepared for the Conference on Poverty and Policy: Retrospect and Prospects, Institute for Research on Poverty, Williamsburg, Virginia, December 1984, 33.

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In this article I try to clear some analytical ground in order to begin to rethink the distinctive silences of American social and economic policy. I am not here asking whether these limits to discourse, thought, and agenda setting are desirable. I do not think they are. Instead, I wish to ask: Do we possess the analytical tools to make sense of these silences? I shall try to show we do not. I also wish to suggest how we might overcome limitations of theory and perspective.

The Limits of Policy Analysis

It is impossible to read such grand books as Joseph Schumpeter's *Capitalism, Socialism and Democracy* and Karl Polanyi's *The Great Transformation* without being reminded of how rich policy analysis can be, and of how broad its historical, comparative, and structural dimensions once were.[7] Both books, written as interventions in ongoing vigorous debates about basic policy options in the United States for the postwar period, are substantial works of social theory.

In the four decades since these volumes appeared there has been an explosion of the policy sciences, but at a cost. Harold Orlans's bittersweet account of his years at Brookings rings true: "the word 'policy' was repeated as often as a blind man swings his cane before him." Orlans chose his metaphor well, for most policy studies have lost the historical vision and sense of direction Schumpeter and Polanyi surely had. As our tools have gained in precision, our scope of attention has contracted. Policy analysis has come more and more to be practical in the narrow sense of referring to quite specific pieces of legislation or activities of government undertaken in a relatively brief compass of time. "The Friday luncheon conversation in the walnut-panelled, roundtable room at Brookings," Orlans recalls, "was exclusively pragmatic: What should or would be done about X? Why had A said or done Z? The horizon in general conversation was seldom more than three months, and, in books, three years."[8]

This limitation begs some important questions: How long is relevant past time? How long is the "present"? Is it a very small slice of time or of longer duration? How does the force of the past have an impact on the present? Is this impact reversible?

The absence of a historical dimension to policy analysis—often thought of merely as background or a frill—is matched too frequently either by the omission of a comparative frame of reference or by comparative studies whose methodological assumptions mask a great deal. Without a comparative vantage point, the silences as well as the noise of the American politics of social policy appear as natural or self-evident.

Every political system's agendas are arbitrary, in the sense that they are selec-

[7] Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper and Row, 1942); Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (New York: Rinehart and Company, 1944).

[8] Harold Orlans, "An Anthropologist Without a Tribe: A Memoir," *The American Scholar* 50 (Autumn 1981): 474.

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tions from the universe of the possible. In the absence of at least an implicit comparative frame, this arbitrariness is naturalized. Limits on discourse and possibility, which should be explained, instead are taken for granted out of a sense of reality. Every political system has a boundary between that which is discussed and disputed and that which is not discussed or disputed. This boundary, which may change over time, can only be identified by treating any single case as part of a group of relevant cases.

Even where the policy literature tackles the American welfare state in a comparative frame, as, for example, in Harold Wilensky's influential book, *The Welfare State and Equality*, there is a tendency to develop comparisons that are insensitive to variations in context and meaning. In his study there is a double condensation. First, "welfare output" is conceptualized operationally as share of gross national product (GNP). As such, Leon Lindberg has observed, it does not take "into account the type of program, style of administration, varying distributive intent and distributive consequences of different types of programs, or whether policies are financed by means of progressive or regressive taxation." Further, by lumping together all the rich and all the poor countries in two categories, Wilensky further flattens the analysis, and produces the not surprising, but on reflection hardly interesting, conclusion that richer countries tend to spend more on social welfare.[9]

In highly aggregated analyses of this kind, which link social welfare output to industrialization, the United States appears as an anomaly. A leader in industrialization throughout the nineteenth and well into the twentieth centuries, the United States has been slow to develop a welfare state. Social insurance programs and other forms of income maintenance were introduced about one generation behind their European counterparts, and other public services and in-kind benefits lagged by two generations.

Most policy analyses take the limited features of the American welfare state for granted, as if they are natural. Or, they are hard pressed to explain them except by a leap to such very grand themes as the nature of the American liberal tradition. Even such a thoughtful analyst as Anthony King has had to resort to the catch-all of national values to explain the special features of the American case.[10] But the welfare state in the United States is special not only because of its policy content as compared to other welfare states. It is distinctive as an outcome of debate *within* the range of possibilities available *within* American politics.

There is an old dispute among political scientists about the distribution of power in the United States. It focuses in part on the porous quality of the political system, and in part on the degree to which matters of social importance are

[9] Harold L. Wilensky, *The Welfare State and Equality: Structural and Ideological Roots of Public Expenditures* (Berkeley: University of California Press, 1975); Leon N. Lindberg, "General Introduction," in Leon N. Lindberg et al., *Stress and Contradiction in Modern Capitalism: Public Policy and the Theory of the State* (Lexington, Mass.: Lexington Books, 1975), xii-xiii.

[10] Anthony King, "Ideas, Institutions, and the Policies of Governments: A Comparative Analysis," *British Journal of Political Science*, in two parts, 3 (July 1973; October 1973).

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the subjects of collective decision making. We need to transcend these discussions by asking not only *whether* some issues are placed on the political agenda but by also inquiring about the *content* of culturally permissable policy discussions concerning the welfare state, planning, and macroeconomic alternatives. Indeed, these issues can hardly ever be off the political agenda entirely because they are the stuff of domestic politics in every advanced capitalist industrial society. In this sense, the pluralists in the power debates of the 1950s and 1960s surely had the better of the argument with the advocates of a "non-decision-making" perspective. The scope of discussion may well be limited less by the exercise of power over an agenda than by limits on discourse broadly shared in the society. Such limits, of course, have not only to be identified, but to be accounted for.

The American welfare state has been constructed in the bounds of a political culture whose limits have proven elastic. These parameters are not easy to specify a priori or post hoc because many features of the welfare state, especially those concerning social insurance, once were defined as outside the scope of a possible politics. Further, there have been a number of moments of quite vital and open contest about the substantive limitations of political debate and possibility. In the 1940s a much wider range of questions concerning social policy and planning were debated at the national level than have been subsequently. And ever since the middle-1970s, the boundary between the public and private spheres has been made the focus of new, politically viable proposals.

The limitations of a good deal of policy analysis go beyond the naturalization of political culture, the absence of comparison and history, or mechanical and simple comparisons. The most analytically powerful of recent policy studies are grounded in choice theory drawn from the parsimonious postulates of neoclassical economics about isolated, self-interested persons who choose rationally between alternatives after computing their costs and benefits.

This methodologically individualist, rational-actor approach has proven remarkably penetrating even in areas of inquiry well outside the ordinary domain of economics. In part this is because so much of modern society is organized according to instrumental, market principles. Further, the rational-choice perspective can provide missing microfoundations to the current macroscopic literature, which is often bedeviled by problems of accounting for individual or group motivation and action. With all these strengths, however, it is also clear that this currently dominant perspective has a number of basic limitations.

The most glaring is the remarkable divorce between policy analyses based on the merger of economics and politics, on the one side, and treatments of American political development, on the other. But within the ambit of choice theory itself there are some fundamental methodological assumptions that make such a bridging between these two analytical perspectives very difficult. Here, I shall mention just one of a number of such issues: changes in preferences.[11] This is a complicated issue, whose relevance for policy agenda setting is obvious.

[11] My favorite critique is Amartya Sen, "Rational Fools: A Critique of the Behavioral Foundations of Economic Theory," *Philosophy and Public Affairs* 6 (Summer 1977).

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Economists have usually dealt only with preferences revealed in market behavior. The "metapreferences," which provide motivation for these first-order preferences, are simply taken for granted. Culture and history, and their constraints and possibilities, are not examined. But these features of society are not immutable. One of the characteristics of human life that makes the species distinctive, Albert Hirschman has recently observed in a critique of choice theory, is the capacity of people for self-reflection. At specific moments they may step back and rethink the larger order of preferences that give shape and content to their everyday choice behavior. Choice theory rarely penetrates to this level, so that it depends on a quite static, ahistorical view of human nature, needs, and wants.[12]

This is not an inevitable limitation. Metapreferences are socially formed. They are cultural constructs. Individual choice always touches transindividual patterns of meaning and group formation. The definition of political identities that people may assume shapes their action as individual members of these collectivities. Individualistic choice theory and transindividual analyses of society, culture, and politics can join. But how shall this coming to terms be accomplished? What analytical and empirical questions shall we ask once it has been achieved? To confront these questions requires yet another analytical excursion, this time into the existing macroscopic literature on the American welfare state.

The Limits of Macroscopic Studies

The category "macroscopic," in the language of the title of Charles Tilly's new book, deals with "Big Structures, Large Processes, and Huge Comparisons."[13] The two most fundamental themes this style of research has dealt with are the development of nation-states and of modern capitalism since the sixteenth century. A number of analysts working in this comparative-historical vein have tackled the welfare state in relationship to these jumbo themes.[14] This literature, in my view, has had many impressive achievements, especially in advancing scholarship on state building and on the historically contingent possibilities of social democracy in Europe. But it is also marked by theoretical difficulties concerning what it seeks to explain, how it constructs causal explanations, and in its tendency to ignore the problem of the microfoundations of history and social change.

The macroscopic literature until recently assumed what Chicago sociologists

[12] Albert O. Hirschman, "Against Parsimony: Three Easy Ways of Complicating Some Categories of Economic Discourse," paper presented at the American Academy of Arts and Sciences, Cambridge, Mass., March 1984.

[13] Charles Tilly, *Big Structures, Large Processes, Huge Comparisons* (New York: Russell Sage Foundation, 1984).

[14] The most impressive developing work in this vein for the United States is by Theda Skocpol and her students. For a summary example, see Theda Skocpol and John Ikenberry, "The Political Formation of the American Welfare State in Historical and Comparative Perspective," *Comparative Social Research* 6 (1983).

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used to call a "natural history" of steady, sequential, ineluctable welfare-state growth. Its central problem has been one of accounting for the long-term secular growth of state activity in all the western societies. The great bulk of macroscopic analysis has sought to explain this trend. These accounts usually hinge on one of two explanatory clusters of phenomena: the development of democratic regimes (and the emergence of citizens) and the development of capitalist market economies (and their class organization). Accounts of consequences have been concerned mainly with the impact of social policy on market processes and economic growth.

Taking these two axes of analysis together, macroscopic studies of the welfare state can be divided into four cells of a two by two table. In some accounts, democracy is seen as the key cause of welfare state expansion, with either positive or deleterious effects on the market; and, in other work, market capitalism is seen as the key cause, with either positive or deleterious effects on the market.

A massive literature has developed from the perspective of T.H. Marshall, who argued that citizenship and the dynamics of political participation in the western democracies are the chief sources of growth in state programs. Democracy, capitalism, and the welfare state make happy partners. The English, Marshall argued, were guaranteed social rights by social welfare legislation that complemented and deepened their previously-secured civil and political rights. This cluster of equally shared rights of all citizens counterbalanced, and in this way made more tolerable, the unequal features of the market economy.[15]

Democratic government as the primary cause of welfare-state development plays a rather different role in the work of analysts who stress that in a representative democracy where costs are diffuse, but benefits concentrated, growth in government necessarily is a constitutive element of politics.[16] Democracy in this view is a flawed form of government, because its ordinary functioning produces programs that create barriers to the capacity of markets to clear efficiently.

Other scholars treat economic, rather than political, factors as central to the development of social policy. Depending on their theoretical and political stances, they emphasize the requirements of economic growth and modernization, or of capitalist accumulation and profit making.[17] What links such views is the argument that modern capitalist market economies require a developed set of state interventions, including the welfare state, for their ordinary operation. Indeed, for some analysts, notably Karl Polanyi, social collapse was the only alternative to antiliberal state intervention.[18]

The distinction between economic and political causes in so much of the literature on the development of social policy cuts across such familiar categories as

[15] T. H. Marshall, *Citizenship and Social Class* (New York: Cambridge University Press, 1959).

[16] For examples, see James Buchanan and Richard Wagner, *Democracy in Deficit: The Political Legacy of Lord Keynes* (New York: Academic Press, 1977); and Samuel Brittan, *The Economic Consequences of Democracy* (London: Temple Smith, 1977).

[17] For examples, see Wilensky, *Welfare State and Equality*; and James O'Connor, *The Fiscal Crisis of the State* (New York: St. Martin's Press, 1973).

[18] Polanyi, *Great Transformation.*

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neo-Marxist, liberal, and social-democratic perspectives. Some Marxists stress the accumulation requirements of capital, while others emphasize the political mobilizations of workers. Some liberals focus on the safety net that markets need to sustain themselves, and others show how markets are endangered by the rougish behavior of power-maximizing politicians who compete for electoral favors. Some social democrats explore the mutually supportive ties between a healthy economy and the welfare state, while others treat the role of government in terms of the ways it countervails the market as a result of the collective capacity of labor and social democratic parties.[19]

With all their variation, both the economy- and politics-centered approaches are functional in character. As such they share in the benefits and costs of functional analysis, whose worth is the subject of a veritable industry in the social sciences.[20] Such analysis has as its leading virtue the development of plausible hypotheses to account for provocative correlations (as those between the development of democracy and welfare states, and the development of capitalism and welfare states). But such hypotheses are only very provisional ideas that have to be elaborated by the specification of mechanisms that actually sustain the imputed functional relationship.[21] As such, they suggest questions for research and propose possible answers. In too much of the macroscopic literature, the quest for explanation stops at a level of analysis that does not take seriously enough the special features of politics and society in the countries of western Europe and North America.

Each of the two main sets of functional explanations is plausible in the sense of having a broad fit with the data, *if* we seek to account for the trajectory of growth in *all* the western states, or, *if* we seek to account for growth in any single one. Sometimes this is the stated intent of the analyst. Karl Polanyi's *The Great Transformation* is an important case in point. Subtitled *The Political and Economic Origins of Our Times*, the book treats only the English case in its suggestive section on the "Rise and Fall of Market Economy." Without state action to secure labor markets (the repeal of Speenhamland) and without state action to tame the wilderness of the marketplace (with factory legislation, child labor laws, and so on), he argues, the new social order could not have survived. Having presented the case for the expansion of the role of government in one setting, he moves on to claim he has discovered a more general functional relationship that holds in all market societies:

> . . . under the most varied slogans, with very different motivations a multitude of parties and social strata put into effect almost exactly the same measures in a series of countries in respect to a large number of complicated subjects. There is, on the face

[19] A useful summary may be found in Graham Room, *The Sociology of Welfare: Social Policy, Stratification, and Political Order* (Oxford: Basil Blackwell and Martin Robertson, 1979).

[20] Two of the most important discussions of functionalism may be found in Arthur Stinchcombe, *Constructing Social Theories* (New York: Harcourt, Brace, and World, 1968); and in G.A. Cohen, *Karl Marx's Theory of History: A Defence* (Princeton, N.J.: Princeton University Press, 1978).

[21] This theme is most persuasively developed by Cohen, *Karl Marx's Theory of History.*

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> of it, nothing more absurd than to infer that they were secretly actuated by the same ideological preconceptions or narrow group interests. . . . On the contrary, everything tends to support the assumption that objective reasons of a stringent nature forced the hands of the legislators.[22]

Polanyi neatly shows the elective affinity between unelaborated functional accounts and single cases or aggregated units of analysis. However, once we attempt to account for the peculiarities of a single national experience within the shared trend of expansion, we find ourselves dealing with analytical issues for which the macroscopic comparative literature is of little assistance, except as it provides very broad, overarching hypotheses about expansion that can be explored in particular settings. Why does the United States rank comparatively low in welfare state expenditures even as the U.S. has shared in the postwar pattern of welfare-state expansion characteristics of all western societies? Why the distinctive zones of silence and noise in American politics?

The current macroscopic literature finds difficulty in grappling with such issues for two reasons, the first less significant than the second. The way the literature has been constructed asks us to choose, a priori and unnecessarily, between economy-centered and state-centered explanations. Why should we choose between them when the interrelationship between them might prove essential?

More important is an obvious logical flaw. If the fundamental causes of domestic state growth are intrinsic characteristics of representative democracy or capitalist development, how can these factors explain variations in the experiences of societies that simultaneously are both capitalist and democratic? The "causes" identified in the macroscopic literature are found in abundance in the United States. The country has as much capitalism and as much representative democracy as any other western country, yet its state–economy and state–society relationships (and discourse about them) are quite special in ways that do not fit either of the available "natural history" approaches to welfare state expansion. For this reason the American case pointedly challenges the comparative-historical analyses that have dominated scholarly discussion. This literature helps indicate, plausibly, why the American welfare state has expanded so dramatically in this century. But this literature's causal factors are too blunt as analytical instruments to explain what traits the United States shares with other western welfare states, and where it differs. They are at least one level of abstraction too removed to grapple in a fine-grained way with the factors that shape the American political agenda.

The final lacuna in this literature is that of microfoundations. This comparative and historical genre of work is most strong in specifying conditions under which individuals and groups act, but, as the recent debates between methodological individualists and traditional Marxists have clarified, it lacks a theory of action to explain the behavior of people under specific historical conditions. In a mirror image of behavioralism, it is good on structure, but weak on behavior and choice within the bounds of structure. With all its limitations, it is possible

[22] Polanyi, *Great Transformation*, 147–48.

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to thoughtfully utilize the rational-choice perspective of intentional, strategic action to complement and strengthen the macroscopic perspective.[23]

Rational Action: About Structure and Within Structure

The social policy activities of governments develop and change in two interrelated ways. The ordinary operation of the economy and existing government programs present sets of programs that appear politically and technically neutral. Policy intellectuals, civil servants, and politicians contesting for votes speak about and respond to these problems. Demographic and fiscal trends threaten to push the social security system into insolvency; the hospital insurance fund is declining; the changing age composition of the population is overwhelming the number of long-term care facilities for the elderly; single-parent households put stress on a host of income support programs: such a list is long and familiar.

In dealing with such questions the policy community may draw on tools ranging from common sense to elaborate and sophisticated approaches from welfare economics and theories of public finance. They may ask questions that are narrowly technical or organizational or fiscal; or, they may be more broad in scope, such as those recently presented as "Six Welfare Questions Searching for Answers" by Henry Aaron.[24] Who, he asks, should be eligible for aid by income and by category? How does welfare affect pretransfer incomes? What should welfare recipients be asked to do in exchange for their grants? Can work requirements be made to function in harmony with labor markets? What is the link between female-headed families and welfare assistance rates? How much reliance should be placed on in-kind assistance?

What is striking about such questions, even at the liberal edge of the policy community, is how much they take for granted the structure of the existing policy agenda based on assumptions about the current "minimum" level of provision.

This social policy minimum consists of policies which, in a given society at a given moment of time, represent an amalgam of what has come to be seen as economically, politically, and culturally necessary. I use "necessity" not at the very general level of most functional accounts, but in the sense of social policy being "necessary for the maintenance of certain ulterior ends held to a large extent in common by the members of that society."[25] This is a minimum by intention shaped in relationship to perceptions about what is required to achieve such diverse goals as political stability, national prestige, economic growth, and a balanced relationship of liberty and equality. It connotes widely shared sets of

[23] A marvelous dissection of these issues is Adam Przeworski, "The Challenge of Methodological Individualism to Marxist Analysis," in French in Pierre Birnbaum and Jean Leca, eds., *Sur l'individualisme* (Paris: Presses de la Fondation Nationale des Sciences Politiques, 1986).

[24] Henry J. Aaron, "Six Welfare Questions Still Searching for Answers," paper prepared for the conference on "The Great Society Revisited: An Examination of U.S. Social/Economic Policies Since 1964," University of Colorado, June 1984.

[25] John Goldthorpe, "The Development of Social Policy in England, 1800–1914," *Transactions of the Fifth World Congress of Sociology*, 53.

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meanings and understandings about the appropriate character and dimensions of government programs. Largely the result of the authoritative resolution of past conflict, at a given moment a social policy minimum is *ordinarily* not the subject of intense struggle. And, as Ronald Reagan has discovered, it is not a simple matter to persuade the Congress and the American public to radically alter an established social policy minimum.

Welfare states develop not only in a problem-solving way in relationship to a policy minimum. Under certain conditions state officials, political parties, interest groups, and social movements utilize elections, lobbying, and protests to achieve valued ends at a pace more rapid or in a direction qualitatively different from that dictated by the emergence of manifest problems in the operation of the existing welfare state. Whether, and at what moments this mode of state development becomes more or less important than the problem-solving mode is a genuinely historical, rather than a theoretical, question.

Put differently, I am suggesting that there are two kinds of welfare state agendas, each with its own logic, sets of actors, and scope of conflict. The first produces changes only marginally different from the historical base, though, as John Padgett observes, on occasion routine decision making may lead to more radical changes.[26] Its politics takes place within a given set of metapreferences between actors with stable identities and mutual expectations. The second may produce more basic alterations in metapreferences through a politics whose scope has widened and where even the basic identities and capacities of political actors may be reshaped. Thus, for example, the legitimation of organized labor and the emergence of a coherent group of New Deal intellectuals in the 1930s and early 1940s created the possibility of a politics about the structure of social policy rather than about alterations within the given structure at the end of World War II.

The two ways in which the welfare state agendas and policies shift has produced an unfortunate bifurcation in the literature between scholars like Nelson Polsby, who stress elite agenda setting, and others, like Frances Fox Piven and Richard Cloward, who stress the significance of mass mobilization.

Most of the leading studies on agenda setting stress the importance of small, specialized groups within the policy community, the bureaucracy, and the Congress. The general public, in an inversion of classical democratic theory, is either inattentive, or ratifies through elections what policy makers have done or want to do. The keys to policy development are the incubation of policy options by the policy community over time, and the development of doctrines and theories to select certain possibilities for government action, and to indicate what those activities might best be. From this perspective, those who have and who control *knowledge*, and who are situated within policy discourse to shape understandings of how to deal with problems manifest in the current social policy minimum, have the generative role. They present options to distracted but power-

[26] John F. Padgett, "Bounded Rationality in Budget Research," *The American Political Science Review* 74 (June 1980).

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ful politicians, who, in turn, mobilize the support of broad publics. Most issues are generated within the logic of current arrangements by clusters of individuals who pay steady, specialized attention to problem solving.[27]

By contrast to the work on agendas, studies of mass mobilization and disruption discover that sporadic ad hoc movements succeeding from time to time in disrupting the usual rhythm of policy making. They create crises by their actions, and thus provoke attention to new issues. From this perspective, the history of social policy is one of steps and discontinuous lifts rather than a steady and gradual upward slope.[28]

These two schools are often counterposed in debate, but they are not mutually exclusive. To the contrary, in the United States, where steady organized party pressures to social policy expansion have been weak, the welfare state has expanded in the two ways identified by these literatures: in the problem-solving technocratic mode, which has been dominant, and in a crisis mode in response to mass mobilizations and insistent demands.

To rethink the silences of American public policy thus demands that we study the character of the policy community and its intellectual transformations, as well as the shifting political capacities of those groups—especially labor and black voluntary organizations—most likely to press for the protection of the existing social policy minimum and for the creation of a policy surplus.

It is at discontinuous moments like those of the 1940s or the Carter-Reagan years that a key point made some time ago by E.E. Schattschneider has the most force. "What happens in politics," he observed, "*depends on the way in which people are divided* into factions, parties, groups, classes, etc." Political identities are contingent, not given. The political identities which become most important help determine which conflicts will become dominant at a given time, the content of these conflicts, and the terms of their contest and resolution.[29]

Schattschneider's emphasis on the identity of political actors helps us think about how to effect a methodological partnership between choice theory and macroscopic work. "What is wrong with methodological individualism," Adam Przeworski perceptively observes, "is not the postulate that collective actions must be explainable by reference to individual rationality but the substantive ontology of society as a collection of undifferentiated and unrelated individuals." He calls, instead, for a perspective which sees "individuals who are embedded in different types of relations with other individuals within a multi-dimensionally described social structure."[30] The formation of group and class identi-

[27] For an essay stressing the importance of "official knowledge" to welfare state development, see Jungwoon Choi, "The English Ten Hours Act: Official Knowledge and the Collective Interest of the Ruling Class," *Politics and Society* 13 (1984).

[28] The best political science work on agendas is by John Kingdon. See his *Agendas, Alternatives and Public Policies* (Boston: Little, Brown, 1984). Also see Paul Light, *The President's Agenda* (Baltimore: Johns Hopkins University Press, 1982).

[29] E. E. Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* (New York: Holt, Rinehart and Winston, 1960), 62.

[30] Prezworski, *Sur l'individualisme,* 27.

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ties in any given society from this perspective may be seen as an *endogenous* and continuous outcome of individual and collective strategic action. Thus, the study of what is distinctive in any society about the nature of class and group identities and about the possibilities of collective action on the basis of these identities may join the macro and micro levels of analysis.

In the United States, the most salient features of the society in this regard are three: the importance of group identities based on enduring regional divisions; the persistence of race as the major fault-line dividing American society; and a pattern of class formation characterized by a rigid division between the work and off-work dimensions of workers' lives, and by the reduction of the meaning of class to that of labor.[31]

Not by chance is Goran Therborn's recent essay on the past century of welfare state development entitled "Classes and States." For it is clear, whatever explanatory bets we place, that the history of the welfare state from the start has been concerned with their intertwined relationship. In 1872, in reaction to the Paris Commune, Otto von Bismarck initiated a conference between Prussia and Austria to discuss how it might be possible to respond to the challenges posed by the various working-class movements. Its thirteen sessions discussed social insurance, child labor, state education, and mutual aid societies. That same decade, various sections of the First International established committees to deal with just these questions. From within and without the state, issues of social policy and social class were joined.[32]

The attempt to make sense of the distinctive range and content of the vocabularies of social policy in any given setting over time entails analysis of both class and the state in ways that promote comparative and historical treatments of their country-specific characteristics. Recent discussions of how to "bring the state back in" have divided between scholars who have tried to invigorate the Marxist tradition and those who self-consciously root their work in the German state theory of Max Weber and Otto Hintze. Both approaches have yet to develop analytical perspectives subtle or nuanced enough for the purpose of accounting for the impact of the organization and policies of states on the limits and content of a given country's social policy agenda.

Marxist work on the state, of course, has not been of one piece. Nicos Poulantzas tangled with Ralph Miliband over questions of definition, agency, and strategy. Erik Olin Wright is far more sensitive to state organization than the group of German scholars who have sought to derive the state from the conceptual categories of *Capital*. But taken as a group, Marxist theories of politics have

[31] An exceptionally rich treatment of regionalism is provided by Richard Franklin Bensel, *Sectionalism and American Political Development, 1880–1980* (Madison: University of Wisconsin Press, 1984). I have discussed issues of class formation and race in Ira Katznelson, *City Trenches: Urban Politics and the Patterning of Class in the United States* (New York: Pantheon Books, 1981).

[32] Goran Therborn, "Classes and States: Welfare State Developments, 1881–1981," *Studies in Political Economy* 13 (Spring 1984).

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shared a number of characteristics that make difficult the comparative and historical analysis of specific states.[33]

These traits include a tendency to make the object of study *the* capitalist state understood at the level of the mode of production. There is much concern with the logic and the constraints that bind the state and capitalism together in *all* modern capitalist industrial societies. Marxist theory thus tends to be autarchic and focused on demonstrating the limits to state autonomy because, in Poulantzas's words, the "hard core of the modern state is to be found in the unchanging kernel of the *capitalist* relations of production."[34]

A corollary assumption is that the state, by definition, is a class-biased instrument. As a very broad proposition this assertion seems to me beyond question, but in many Marxist treatments the attempt is made to demonstrate the appropriateness of quite rigid and *a priori* assumptions about the class character and functions of the state in capitalist societies. One consequence is that strategic emphasis is then placed on the destruction of the capitalist state. Since no such empirical "smashing" has ever occurred, this orientation even at its most suggestive inhibits strategic political reasoning by sticking only to logical guesses about future transformations, rather than providing empirical assessments of the impact of alternative kinds of struggle for actual patterns of class relations and public policy.

To be sure, a centerpiece of recent Marxist work has been the attempt to specify the "relative autonomy" of the state from the dominant classes. Theda Skocpol has acutely observed that if this possibility is introduced as a potential outcome, then so can the possibility that states may be autonomous enough to challenge "entire class structures or modes of production." She contends that recent Marxist contributions have stopped at the brink of a serious consideration of state autonomy because they have not faced directly "the questions of what states are in their own right, and how their structures vary and their activities develop in relation to socioeconomic structures."[35]

She thus proposes a "realist" and "organizational" approach, self-consciously rooted in Hintze and Weber, which treats the state not just as an underspecified arena in which societal conflicts are played out, but as "a set of administrative, policing, and military organizations headed, and more or less well-coordinated by, an executive authority. Any state first and fundamentally extracts resources from society and deploys these to create and support coercive and administrative organizations."[36] As such, the state, and state officials, have their own goals, in-

[33] I have reviewed some of the key works in this literature in Ira Katznelson, "Lenin or Weber? Choices in Marxist Theories of Politics," *Political Studies* 24 (December 1981), where I develop the points which follow in a more relaxed way.

[34] Nicos Poulantzas, *State, Power, Socialism* (London: New Left Books, 1978), 49.

[35] Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia, and China* (New York: Cambridge University Press, 1979), 29, 28.

[36] Ibid., 29.

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terests, and strategic perspectives which may or may not coincide with those of other actors.

The literature on the state in the Weberian tradition, which takes "the state seriously as a macrostructure," has not advanced much beyond the "weak"–"strong" state distinction reintroduced into social science discourse by J.P. Nettl in 1968.[37] The Weberian state tradition thus remains underspecified. Its core distinction between weak and strong states congests a host of alternative possible meanings for these terms. Consider the following different possibilities:

A state may be "strong" if it erects clear boundaries between the public and private domain, and succeeds in capturing for itself functions that previously or elsewhere belonged to civil society; or if it has a developed administrative, bureaucratic apparatus that has coherent boundaries, rules, and capacity; or if it is capable of action as a unitary actor within the global system of nation-states; or if it manages to extend its sovereignty over all the territory it claims to legitimately control; or if its organization is unitary rather than federal, centralized rather than decentralized; or if it is capable of imposing the wishes and interests of the dominant classes on the majority or society; or if it is capable of resisting such domination; or if it has a developed steering and planning capacity capable of shaping state and society; or if its activities rest on a basis of mass political participation, mobilization, and consent; or if it exists within a culture hospitable to developed stateness.

This long list does not exhaust the possible meanings of the term "strong state," but it does indicate just how condensed the term is. More positively, it suggests various dimensions to analysis if we wish to treat states and what they do not just as arenas, but as partially independent actors that shape economies and societies, and especially if we want to connect distinctive national patterns of state organization and policy to distinctive national patterns of class formation. We might think of the state in such terms which, simultaneously, take the state seriously without forcing a choice between a stress on the micro-rationality of state officials and politicians, on the one side, and macro-functional accounts linking what the state does to the requirements of capitalism and democracy, on the other side.

Recent macroscopic work on the state has drawn attention to the ways that bureaucrats, politicians, and government policies contribute to the making and shaping of class and group identities, and to the definition of self-interest that various groups in society come to have. Yet we still need to know more about the "circumstances and motives under which these authorities intervene to change the ways in which individuals and groups perceive their interests and act collectively to defend them."[38]

[37] J.P. Nettl, "The State as a Conceptual Variable," *World Politics* 20 (July 1968).

[38] Philippe Schmitter, "Neo-Corporatism and the State," European University Institute Working Paper #106, 1984. There is a growing interest in strategic approaches to the state as a way of breaking out of the current theoretical impasse. A provocative example is Bob Jessop, "The State and Political Strategy," paper presented to the International Sociological Association Conference on Urbanism, University of Sussex, April 1985.

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Politicians and civil servants who occupy positions in the state in the various countries of western Europe and North America possess a repertoire of policy instruments to deal with the existing array of societal problems. With respect to economic and social policy, these include regulation, nationalization, indicative planning, neocorporatism, control of the money supply, subsidies to industry, and social insurance and income maintenance programs. But in any given state at a given time some of these instruments are much more likely to be adopted than others; and some are not even the subject of political discussion and debate. Why is this the case? Where shall we look to find out?

Most considerations of state policy making look either to macrofunctional imperatives of capitalism or democracy, or to the micromotives of actors inside or outside the state. Philippe Schmitter's recent work on neocorporatism develops these issues in particularly suggestive ways. Schmitter proposes that we ignore at our peril a level of state-society interaction that depends neither on system nor on individual rationality, but on "the relationship between the interests of class/sectoral organizations and the interests of the state as an institution." He defines the former in terms of policy goals—that which is demanded of the state—and the latter in terms of the effort by the state to preserve the efficacy of its decisions (or, what sometimes is referred to as legitimacy). This definition of state interests transcends the individual interests of politicians and civil servants who wish to preserve their positions, and it is distinct from functional treatments of the state in relationship to the imperatives of capitalism and democracy.[39]

From this perspective, each of the dimensions of "strong" stateness, to borrow Nettl's term, and the distinctive configuration of these dimensions in a given state at a specific time, may be considered as a mix of incentives and disincentives to various forms of group and class dispositions and collective action.[40]

These considerations help us think both about how a specific policy minimum gets established, how a language of policy is forged in relationship to it, and how it shifts over time. For it is as a product of the intertwined connections between distinctively formed groups and classes and distinctively organized states that public policy is made.

But, of course, it is not "the state" in general, but the American polity, in particular, with which we are concerned. And just as American group and class patterns are special, so are some key features of the American state, viewed in a comparative perspective. These include, decentralization and federalism, an institutionally constrained presidency, a porous central bureaucracy, catch-all party organizations, a highly autonomous Congress, and the importance of law and the judiciary in policy making and implementation. The strategic interactions between *this* state and the distinctive American mix of societal groups pro-

[39] Ibid.

[40] This perspective is developed by Charles Noble, "The Welfare State and the Problem of Reform: The Case of OSHA," paper presented to the American Political Science Association annual meeting, September 1983.

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vide the matrix for agenda setting and political conflict about the welfare state.

Unfortunately, much of the current macroscopic work that has moved beyond the kinds of functional accounts I summarized above has been constructed in a debate between society and state-centered perspectives. One set of scholars (John Stephens, Richard Scase, Francis Castles, Douglass Hibbs, David Cameron, Walter Korpi, et al.) stresses the significance of working-class capacity as the key factor in counteropposition to another set (Hugh Heclo, Theda Skocpol, Michael Shalev, et al.) who emphasize the role of state organization and "the potentially autonomous initiatives of the officials and political leaders of national states with varying regime structures, policy inheritances, and administrative and fiscal capacities."[41]

Orloff and Skocpol, following Shalev, call the first orientation the social democratic perspective. They approvingly cite his critique of such a view for its neglect of the interests of parties, politicians, and bureaucrats. Shalev proposes instead a state-centered view, which could take these factors into account. Likewise, Orloff and Skocpol organize their comparative study of social policy in Britain and the United States in the late nineteenth and early twentieth centuries by explicitly distinguishing their account from both economy-centered modernization functional arguments and from the social democratic approach. They argue that

> To understand the timing and forms of emerging modern welfare states . . . we must shift attention from socioeconomic development as such, and from the strength of the industrial working class *alone* toward the overall governmental, political, and historical contexts within which working class organizations and their organizations interact with other social and political forces.[42]

Unfortunately, they treat the working classes of the two countries only in terms of their willingness to support social insurance programs. Once they establish that both did, they look for differences in outcome to the preferences of state officials. They do so in part to establish an empirical case for the importance of the state, to which I subscribe, and to make a polemical case which, at times, is overstated to counterpose starkly a state-focused view from the more common class mobilization perspectives.

I think such a debate (which actually violates the dicta they establish in the citation I have already quoted) is off the mark. For how can any social democratic perspective be compelling if it avoids grappling with the specificity of the state; and how can any state-centered view make sense of the state's activities and policies unless it locates them in interaction with the dispositions and collective action of groups and social classes?

Where do we go from here? Throughout this critique of concepts and catego-

[41] A good summary of these positions may be found in Ann Shola Orloff and Theda Skocpol, "Why Not Equal Protection? Explaining the Politics of Public Social Welfare in Britain 1900–1914, and the United States, 1880's to 1920's," *American Sociological Review* 49 (December 1984).

[42] Ibid. (Emphasis added.)

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ries I have suggested the elements of an approach to overcome the current analytical limitations of studies of the welfare state: historicity and an attention to critical "branching" moments, a focus on political language, the specification of mechanisms within functionalist accounts, more supple movement between macroscopic processes and their microfoundations, more careful comparative analyses (even where the comparisons are implicit), an emphasis on the role of knowledge and the policy community in guiding welfare state development, and a strategic approach to state–society analysis.

These points of emphasis above all are means to explore the construction and changeability of the always present division between the domains of political speech and political silence. By making this problem the centerpiece of analysis, we can widen the domain of empirical studies, make a place for counterfactual analysis, and develop a taste for thinking about possible worlds that are not very far away, but seem to be just beyond our grasp. Not only our political science, but our politics could profit from such an imagination.

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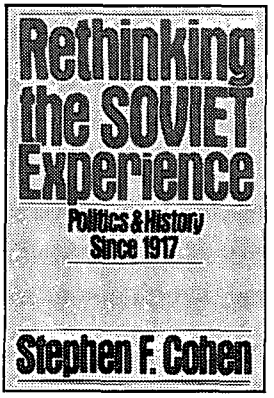

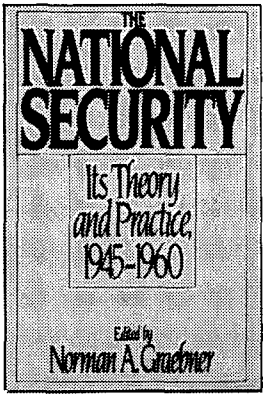

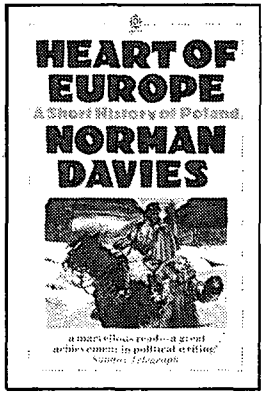

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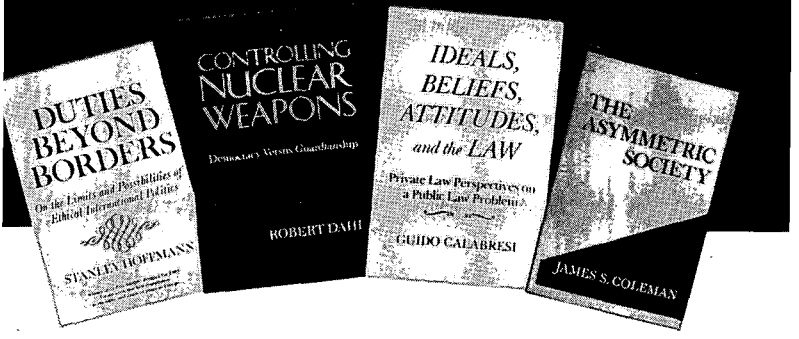
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